

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

CONFIRMATION HEARINGS ON APPOINTMENTS TO THE FEDERAL
JUDICIARY AND THE DEPARTMENT OF JUSTICE

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**CONFIRMATION HEARINGS ON: DANNY J.
BOGGS, WALTER J. GEX III, THOMAS J.
McAVOY, AND SIDNEY A. FITZWATER**

WEDNESDAY, FEBRUARY 5, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:02 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Biden, McConnell, Simon, Metzenbaum, and Heflin.

Staff present: Duke Short, chief investigator; Reginald C. Govan, minority counsel and investigator; and Laurie A. Westley, chief counsel to Senator Paul Simon.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We are met today to hold hearings on some different judges—Daniel J. Boggs, of Kentucky, to be U.S. circuit judge for the sixth circuit. Is Mr. Boggs here?

Mr. BOGGS. Yes, sir.

The CHAIRMAN. You are endorsed by Senator McConnell. He is a member of this committee, so I do not think you will have much trouble getting confirmed, especially since such a good man endorses you.

U.S. district judge, Walter J. Gex, is it?

Mr. GEX. Gex, Mr. Chairman.

The CHAIRMAN. Of Mississippi, to be U.S. district judge for the southern district of Mississippi. I guess Senator Cochran nominated you, did he not?

Mr. GEX. Yes, sir, Senator Cochran nominated me.

The CHAIRMAN. He is in the Philippines; he has got a statement for you. Is Senator Stennis going to be here?

Mr. CRESSWELL. Senator Stennis will not be here, but I am Mr. Cresswell here to represent Senator Stennis.

The CHAIRMAN. Well, they both endorse you and they are both very fine men, so I do not anticipate any problems.

Mr. GEX. Thank you, sir.

The CHAIRMAN. Thomas J. McAvoy, of New York, to be U.S. district judge for the northern district of New York. Is Senator D'Amato here?

[No response.]

The CHAIRMAN. He has not arrived yet; I think he will be here soon.

Judge Sidney A. Fitzwater, of Texas, to be U.S. district judge for the northern district of Texas. Senator Gramm, I understand, will be here.

Now, if all you gentlemen will stand up and be sworn at one time? Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BOGGS. I do.

Mr. GEX. I do.

Mr. McAVOY. I do.

Judge FITZWATER. I do.

The CHAIRMAN. Thank you.

Now, Senator McConnell, I have got a conflict with a very important Armed Services meeting. Could you take this hearing for me?

Senator McCONNELL. Mr. Chairman, I will be glad to take it just as soon as I introduce Mr. Boggs.

The CHAIRMAN. You go ahead and introduce him and then I will turn it over to you.

STATEMENT OF HON. MITCH McCONNELL, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator McCONNELL. Mr. Chairman, I had not originally intended to read part of the remarks that I had prepared, but—

The CHAIRMAN. You can just put it in the record.

Senator McCONNELL. I can, but I am going to refer to some of it because he is truly outstanding. I have known Mr. Boggs for 15 years and he is, in my judgment, one of the brightest, if not the very brightest person I have met over the years

He has had a long and distinguished record of public service both in Kentucky and in Washington. He went to Harvard, from which he graduated with honors. He went to the University of Chicago Law School where he made the Order of the Coif.

He is currently the Deputy Secretary of Energy. He has been in one significant position after another throughout his adult life. So it is with particular pleasure that I am here today, Mr. Chairman, as a member of this committee and as a Senator from Kentucky to strongly recommend Danny Boggs for the U.S. circuit court for the sixth circuit.

There just simply could not have been a better selection than Danny Boggs. I am excited about his joining that court. I think the quality of his opinions will justify the confidence that the President has placed in him.

I will at this time ask that my entire statement on his behalf be put in the record, but I just want to reiterate how enthusiastic I am about Mr. Boggs' nomination.

The CHAIRMAN. Thank you very much. Without objection, we will place your statement in the record.

[Committee insert follows:]

PREPARED STATEMENT OF SENATOR MITCH McCONNELL

Mr. Chairman, it is indeed a privilege and an honor to be able to introduce to my colleagues on the Judiciary Committee today Mr. Danny J. Boggs, who has been nominated to be a Judge of the United States Court of Appeals for the 6th Circuit.

Danny Boggs is a truly remarkable Kentuckian. His record of success and achievement begins with his earliest scholastic endeavors. While a student at College High School in Bowling Green, Kentucky, Mr. Boggs was one of the members of the Kentucky state high school debating championship team in 1959. Those not familiar with the quality of the educational institutions in Kentucky might not think much of that accomplishment, but Danny proved that being debate champion in Kentucky was quite an honor. He won the Charles Coolidge debate prize at Harvard in 1964 and 1965, and went on to win moot court competitions in both of his second and third years at the University of Chicago's Law School.

But his achievements are not merely limited to debate trophies. After receiving a Harvard National Scholarship and National Merit Scholarship, Mr. Boggs graduated *cum laude* from Harvard and went on to join the Order of the Coif at the University of Chicago.

Following graduation from law school and a brief teaching engagement at Chicago, Mr. Boggs returned to Kentucky, where he served in various capacities in state government, perhaps most notably as Administrative Assistant for Education and Legal Counsel to former Governor Louie B. Nunn.

Coming to Washington, he served in a variety of distinguished capacities, among them Assistant to the Solicitor General of the United States, Robert H. Bork. In that capacity, he constructed the Government's argument in a wide range of cases before the United States Supreme Court, often preparing the brief himself. Indeed, he has personally argued numerous cases before the Supreme Court, probably far more than most nominees to the federal bench who have come before this distinguished Committee.

In addition, Mr. Boggs has served as Assistant to the chairman of the Federal Power Commission, Deputy Minority Counsel of the Senate Committee on Energy and Natural Resources, and Senior Policy advisor in the Office of Policy Development at the White House, later becoming Assistant Director of that office and Special Assistant to the President.

Finally, in 1983 Mr. Boggs was appointed Deputy Secretary of the United States Department of Energy. In its May 1985 issue highlighting the decision makers in Washington, the National Journal described Mr. Boggs as the "acknowledged energy expert in the Energy Department". That, I believe, is quite a compliment given that the entire Department is staffed by energy experts.

Most recently, Mr. Boggs was named head of the United States' delegation to the International Atomic Energy Agency General Conference. In addition to all this, Mr. Boggs has been engaged in the private practice of law, both in Bowling Green, Kentucky and here in Washington, D.C.

I believe that there are few people as intellectually or professionally qualified for a position on the 6th Circuit Court of appeals as is Danny J. Boggs. For those of you who are not familiar with the 6th Circuit, I should point out that of the 11 members of that court serving before the recent increase in its membership authorized in 1984, nearly all of them were judges and lawyers who had spent a great deal of time in private practice or as district judges. Danny Boggs will certainly bring a new dimension to the 6th Circuit, one that will make the court even more highly qualified than it now is. I am pleased to support the nomination of Danny J. Boggs, and to introduce him to you today.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Boggs, we are glad to have you here. Senator McConnell will come up now and question you.

I notice you were with Governor Nunn, were you not?

STATEMENT OF DANNY J. BOGGS, OF KENTUCKY, TO BE U.S. CIRCUIT JUDGE FOR THE SIXTH CIRCUIT

Mr. BOGGS. Yes, sir, at one point I served in his administration.

The CHAIRMAN. He is a good friend of mine; he is a very fine man.

You are with the Department of Energy now as Deputy Secretary, is that right?

Mr. BOGGS. Yes, sir; yes, sir.

The CHAIRMAN. All right. Senator McConnell, if you will take over now, I would appreciate it. Thank you.

Senator McCONNELL [presiding]. If you would like to introduce your family, this would be a good time for that, Danny.

Mr. BOGGS. Well, thank you very much, Senator. I have with me today my wife, Judy; my daughter, Rebecca; and also my brother, Mike, and Charles Zimmerman, an attorney from Kentucky as well.

Senator McCONNELL. We are glad to have all of you here. I might point out that Danny's wife, Judy, is also a distinguished attorney—a two-lawyer family.

Mr. BOGGS. Working on three.

Senator McCONNELL. Working on three.

The Chairman has asked me to ask certain questions of all the nominees and I will proceed to those now.

Your legal experience has been predominantly in government service dealing with the policy and administrative aspects of legislation and regulation. Now that you have been nominated for the position of U.S. circuit judge for the sixth circuit, do you feel this experience will be beneficial to you as a circuit court judge, and if so, how?

Mr. BOGGS. Well, Senator, my public experience has been in a number of different areas, and I think would each bring something. I have worked for a Senate committee, so I have seen something of how congressional intent is formed and expressed.

I have worked for a regulatory agency where some of our work was judgmental, in the sense of choosing between opposing opinions as to what the law was. And in working for the Office of the Solicitor General for about 2 years, of course, I had some very close experience with appellate litigation both with judging whether appeals should be made from lower court decisions which, of course, involves some of the same type of activity, and with presenting arguments to the Supreme Court.

I speak specifically to my public experience. To the extent that I have also had some private experience, I think that also relates to how people come to small-town lawyers and how cases arise out of that.

So I would believe that each of those aspects would be beneficial to me.

Senator McCONNELL. Thank you. How does a responsible judge go about the process of interpreting such seemingly open-ended constitutional provisions as the due process or equal protection clauses?

Mr. BOGGS. Well, I think you primarily have to look to the record of the debates of the adoption, and the ratifications. You look to the history of interpretations. Certainly, those particular clauses are ones on which there has been a lot of debate.

I think if you look in the United States Code, Annotated, you would probably find more pages devoted to those two phrases than any other.

I think you should not look into your own policy prescriptions of what you would vote for as a legislator. But I think that the fact that the phrases seem simple does not mean that they are uninterpretable, nor does it mean that the latitude for interpretation is totally open-ended.

Senator McCONNELL. Thank you. Would you give us your own perspective on the recent trend in the Supreme Court toward stricter requirements of standing?

Mr. BOGGS. Without expressing a particular opinion on a particular doctrine of standing, I think it is important that parties have a real stake in the controversy before the Court.

Courts are not a debating society or a legislature which makes up its own agenda, and I think that a proper doctrine of standing does attempt to limit access to the courts to those with a real stake in the controversy.

I would note that it does seem to me in a broad way, though, that many of the criticisms of standing decisions are really criticisms of the underlying substance of the decision because, in general, a suitable plaintiff can be found to bring a case even if a different one does not have standing.

So while it is an important doctrine for judicial economy, I think it should not be taken that a change in the doctrine of standing would make a massive difference in the ultimate outcome of cases.

Senator McCONNELL. There is frequently a conflict between the deeply felt constitutional views of a Federal judge and the constraints of judicial precedent. How would you resolve the tension between jurisprudence and precedents?

Mr. BOGGS. I was just reflecting, that Prof. Harry Kalven, with whom I was a junior instructor at the University of Chicago Law School, used to say that the law is analytically dense, meaning that in between any two cases you can postulate another case.

And, of course, a great deal of what judges do is having to distinguish cases and to decide whether exceptions are warranted. And as the law evolves, that process allows for a great deal of accommodation between precedent and ruling on a different set of facts.

At the same time, settled precedents should be followed as a matter of judicial economy; also, as a matter of prudence, I think, for an appellate judge before a Supreme Court precedent.

So I think you simply have to work it out in each case, but that, in general, certainly square precedents by the Supreme Court must be followed.

Senator McCONNELL. Senator Simon, I know you will probably have some questions for Mr. Boggs, but we want to accommodate Senator D'Amato by giving him a chance to make his statement on behalf of Mr. McAvoy.

Senator SIMON. I always want to accommodate Senator D'Amato.

Senator McCONNELL. That is an excellent idea. We will get back to Mr. Boggs in just a minute.

Senator D'Amato.

STATEMENT OF HON. ALFONSE D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'AMATO. Thank you very much, Mr. Chairman. Indeed, it is a pleasure for me to be here today and have the privilege to introduce to you and to the Senate Judiciary Committee Thomas J. McAvoy.

Mr. McAvoy is a most able and distinguished nominee for the U.S. district court judgeship for the northern district of the State of

New York. This nomination has been strongly endorsed by all of the bar associations in that area—Broome, Delaware, Chenango, Chemung—because this happens to be a truly historic appointment.

Tom McAvoy will be the first Federal judge permanently assigned to Binghamton, NY, and people from that great area tell me they cannot recall a time when a district court judge was appointed from the southern tier in its entirety.

There is an exceptional, urgent need for Judge McAvoy. There is a backlog of some 3,000 cases in that district, so that the day that Judge Tom McAvoy reports to work, he will start with a backlog of some 1,000 cases.

The phrase "justice delayed is justice denied" is more than a phrase to the people of the southern tier; it is a painful fact of life. So we are pleased and delighted that the President has nominated Mr. McAvoy because there is an urgent need for someone with his intelligence, intellectual acumen, and man of his dedication.

After graduation from Villanova University, he attended Union University Albany Law School, where he was editor of the law review. Since that time and since his graduation in 1964, he has established a career as a practicing trial attorney without peer in that region of our State.

He has served his community well, being chairman of the county legislative body, being involved in the body politic, as well as serving in numerous capacities in various charitable and other endeavors throughout his community.

And so, Mr. Chairman, it is with an unqualified and enthusiastic endorsement from this Senator that I recommend to you and to the committee Thomas J. McAvoy. I believe he will be an outstanding Federal district judge.

Senator McCONNELL. Thank you, Senator D'Amato; we appreciate it.

Mr. McAvoy, if we could, we will get back to you in a moment. Mr. McAVOY. Yes, sir, thank you.

Senator McCONNELL. I would like to recall Mr. Boggs and give Senator Simon a chance to propound questions to him.

Senator SIMON. Thank you, Mr. Chairman.

Mr. Boggs, first of all, I note that you got a mixed "well-qualified" and "qualified" rating from the American Bar Association, which is a better rating than many of the nominees have received.

I have two concerns, however, as I look at your record. One is your lack of trial experience. Just glancing quickly—and I have to say it has been a very quick glance here—through your background, you look like you would make a good legislator, but what about your trial experience or lack thereof? How many cases have you been involved in in trial—

Mr. BOGGS. Well, Senator, as indicated in my nomination form, I believe that I have tried two cases through to jury verdict; have been involved in a modest number, probably not more than 10, cases at the trial level in terms of proceedings before a judge.

Senator SIMON. I have to say, from the viewpoint of someone who is going to become a judge, that is not—and I do not mean this disrespectfully to you, but it is not an outstanding record.

Do you intend to do anything to bone up? Let us just say you are approved next week by the committee and approved by the Senate the following week. Do you intend to do anything, as some of the previous nominees have indicated to this body, to prepare yourself a little more fully for sitting on the bench?

Mr. BOGGS. Well, Senator, let me say first that if I were appearing before this committee for a district court judgeship, I think I would feel perhaps more inadequate to the task.

At the appellate level, in terms of the experience I have had in the solicitor general's office and elsewhere dealing with written opinions and reading and writing, I believe—personally I feel that I will be able to do the job immediately.

At the same time, I think in every job I have undertaken I have tried to take the opportunity to be as fully prepared as I can be. I have already had some discussions with the Judicial Administration Center in terms of the materials and courses that they offer, which are quite extensive, for judges generally, as well as some of them that are specifically applicable to appellate judges, and I intend to avail myself of all of those.

Senator SIMON. I also received a communication from someone in the legal profession in your State who obviously was not in favor of your nomination, who described you as partisan to the extreme.

As you review cases that come to you, are you going to be able to be a judge for all the people?

Mr. BOGGS. Absolutely, Senator, and not having previous knowledge of that communication, I believe that were it relevant or had the opportunity been offered, I could produce a great many people with whom I have dealt in my career who may well have been quite opposed to my views on substantive grounds who I believe would attest that I had dealt with them and their positions completely fairly under the circumstances.

Obviously, I have been involved in politics. I would hope that that was not a disqualification for the bench, and I think that in all of my efforts in Government and out, when it has come to hearing people out and making a decision on their cases, on their issues, whether they be legal or nonlegal, that has been the way I have dealt with people. To hear them out completely and judge as fairly as I can, and that is certainly what I would intend to do on the bench.

Senator SIMON. One of the requirements of the bar association is that a member of the bar—every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged.

Can you tell me what you have done to meet that requirement?

Mr. BOGGS. Well, with regard to that quotation from the Canons of Professional Responsibility, Senator, certainly during my time in private practice I have accepted appointed criminal defense. I have undertaken the representation of people whose creditworthiness was not immediately apparent.

Certainly, in my activities in the jobs that I have held, which frequently have had relationships to public policy as to how they would affect the disadvantaged, I think I have always tried to take that into account.

Senator SIMON. I have no further questions, Mr. Chairman. Thank you.

Senator McCONNELL. Senator Simon, I might just say briefly, since you were not here as we began the hearing, that I have known Mr. Boggs for 14 years and I have observed his work in a variety of different contexts.

As I indicated earlier, I think the President could not have picked a brighter, more capable person from Kentucky than Mr. Boggs and I think we will be pleased with his tenure on the bench.

Thank you very much.

Senator SIMON. Thank you, Mr. Boggs.

Senator McCONNELL. I would like to call now Walter Gex. Mr. Gex, would you like to introduce any members of your family who may be here?

STATEMENT OF WALTER J. GEX III, OF MISSISSIPPI, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Mr. GEX. Yes, I would, Mr. Chairman. My wife, Kay, is here, and I have two friends, Roger Dale Lodner and Bert Courrege, that are here.

Senator McCONNELL. Thank you.

Mr. GEX. Thank you, sir.

Senator McCONNELL. The chairman has asked me to propound several questions to you, Mr. Gex. You have been a practicing attorney for over 20 years, and during this time your litigation experience has been primarily civil in nature.

Do you feel that your lack of criminal trial experience will in any way hinder you in the performance of your duties as a Federal judge?

Mr. GEX. Mr. Chairman, I do not think that it will. I have had relatively extensive trial work in the criminal area. In addition to that, I have taken advantage of the opportunity that the Judicial Center has put on for judicial conferences, the last of which was last week in Raleigh, NC, at which time we had a relatively extensive program concerning sentencing and penitentiary observation and various other substantive criminal matters.

Next week, we have another conference put on in Washington for a week, at which time more substantive areas will be covered, a part of which will be the criminal area. And I do not think that any lack of experience—I have had extensive trial experience in the civil area. That is where the majority of my time has been dedicated.

However, I do have experience in the criminal area, and I also took advantage of an opportunity that the senior judge, Dan Russell, in the southern district of Mississippi, offered me the opportunity to sit with him the week before last on the bench during a 4-day trial of a criminal matter.

So I did get the opportunity to see the judicial side of it versus the practicing side.

Senator McCONNELL. Thank you. Would you tell the committee what procedures you will follow in determining any potential conflicts of interest and how do you intend to resolve them?

Mr. GEX. Mr. Chairman, at any point in time that I observe any area at which I feel that there is an imminent conflict in interest or at any point in time at which a motion is filed requesting me to recuse myself, I would go into the matter substantially. And in the event that I did find an area that would either offer me a pending obvious conflict or one in which there was a potential conflict, then I would request that the matter be certified to another sitting judge in the district.

We are fortunate in that in our district we do have additional sitting judges; they are five in number now.

Senator McCONNELL. Certainly, judicial temperament is a prerequisite for a Federal judge. Would you please give us your thoughts on that subject?

Mr. GEX. Mr. Chairman, I think that judicial temperament is the watch word in the Federal judiciary, and should be. I think that your temperament has to be even-handed, and this is an accumulation of your history, your life history, your legal history.

I think that I—in my background, I have a relatively stable attorney history. I have been an instructor in law schools during a period of time. I have practiced both plaintiff and defense-oriented civil practice, and I have had experience in the criminal field.

Senator McCONNELL. The phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority.

What does the phrase "judicial activism" mean to you?

Mr. GEX. Mr. Chairman, I perceive judicial activism as being activity on behalf of the judiciary that exceeds the bounds of their basic limits, and that is that when this occurs, this is an effort toward deciding issues that are generally broader in scope than those that are presented to the judge in a given case.

I personally—assuming those being the basic guidelines of judicial activism, I am opposed to it; however, with this caveat, and that is that the basic oath of the district judge is to uphold the constitutional rights of litigants.

And at any point in time in which a constitutional right of a litigant is involved, I think he has the absolute right to a hearing and to a judicial decision.

Senator McCONNELL. We have statements from both Senator Stennis and Senator Cochran in support of your nomination and I would ask that they be inserted in the record.

[Committee insert follows:]

U.S. SENATE,
Washington, DC, February 5, 1986.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary, U.S. Senate.

Dear Mr. Chairman: I regret that I am unable to appear in person to introduce to the Judiciary Committee Mr. Walter Gex, III, whom I recommended to the President for nomination as United States district judge for the Southern District of Mississippi.

I would appreciate very much your formally introducing Mr. Gex in my absence. As you may know, I accepted the invitation of the President to serve as an observer of the Philippines election, and for that reason, I am unable to be at the hearing.

I appreciate very much your assistance in this matter.

Sincerely,

THAD COCHRAN,
U.S. Senator.

REMARKS OF SENATOR THAD COCHRAN IN SUPPORT OF NOMINATION OF WALTER
JOSEPH GEX III

Mr. CHAIRMAN. I am pleased to recommend to the members of the Judiciary Committee Mr. Walter Joseph Gex III for confirmation as United States district judge for the Southern District of Mississippi.

I recommended Mr. Gex to the President for this position, because I believe he possesses all the qualifications for service on the Federal bench.

I have known Walter Gex since we were both students at the University of Mississippi. A native of Bay St. Louis, Mississippi, he attended St. Stanislaus College and Georgia Tech before completing his undergraduate degree at Ole Miss in 1961. He went on to earn a law degree from the University of Mississippi in 1963.

Mr. Gex began his legal career with a respected Jackson, Mississippi, law firm in 1963, where he was engaged primarily in insurance defense practice. Within three years, he was made a partner in the firm.

In 1972, he joined his family firm in his home town of Bay St. Louis, and has since enjoyed a successful general practice. He serves as counsel to the Hancock County Board of Supervisors, and is a member of the Board of Commissioners of the Mississippi State Bar. Mr. Gex is a fellow of the Mississippi State Bar Foundation. He is also a community leader who contributes his leadership to groups such as the Boy Scouts and the Knights of Columbus.

Walter Gex possesses a keen intellect and the highest standards of personal integrity. I am confident that he will be an outstanding judge and reflect credit on the Federal judiciary.

Mr. GEX. Thank you, sir.

Senator MCCONNELL. That finishes the chairman's question which he had for you.

Now, Senator Simon.

Senator SIMON. Mr. Gex, did anyone in the process of your nomination ask questions that you felt were at all improper?

Mr. GEX. No, sir, Senator.

Senator SIMON. You learned, I assume, originally from one of your Senators that you would probably be the nominee?

Mr. GEX. Yes, sir, from Senator Cochran.

Senator SIMON. Right.

Mr. GEX. He contacted me and advised me that he would like for me to be the nominee for the position.

Senator SIMON. And then you went before the Justice Department and met with some Justice Department people, I assume?

Mr. GEX. Yes, sir.

Senator SIMON. And they asked what kind of questions of you?

Mr. GEX. Well, primarily background questions, trying to determine the extent of my trial background, areas that I have litigated matters—primarily, civil versus criminal—and, you know, how much criminal experience I have had. Basically, the question of my experience—that is primarily what they were concerned with.

Senator SIMON. Any questions that tested your ideological purity or how you would rule on any kind of case?

Mr. GEX. No, sir; no, sir, I have not been questioned on that and would resent it if I had been.

Senator SIMON. I thank you.

Thank you, Mr. Chairman.

Mr. SHORT. Call Mr. McAvoy, I think.

Senator SIMON. I do not know if you were asked to introduce any members of your family.

Mr. GEX. Yes, sir; yes, sir, I was, Senator. Thank you.

Senator SIMON [presiding]. We thank you very, very much.

Mr. GEX. Thank you very much, sir.

Senator SIMON. Mr. McAvoy, you may wish to introduce members of your family.

STATEMENT OF THOMAS J. McAVOY, OF NEW YORK, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF NEW YORK

Mr. McAvoy. I am here by myself, sir.

Senator SIMON. OK. Mr. McAvoy, you heard the questions that I just asked of the previous nominee. You learned, I assume, also, through your Senator that you were going to be a nominee?

Mr. McAvoy. Yes, I did, Senator.

Senator SIMON. Were questions directed to you by the Justice Department that you felt were in any way improper?

Mr. McAvoy. Not improper, sir.

Senator SIMON. Any questions regarding how you might rule on any case that might come before you?

Mr. McAvoy. No; they did not ask me about any future rulings. It was basically about my experience and my background.

Senator SIMON. Were there questions that were ideological in orientation at all?

Mr. McAvoy. Well, I would assume they asked questions regarding the death penalty, abortion, and the like.

Senator SIMON. They asked questions of you on those issues?

Mr. McAvoy. Yes.

Senator SIMON. But you did not feel they were improper?

Mr. McAvoy. They did not phrase them in an improper manner. They wanted to know if I—

Senator SIMON. How did they phrase them?

Mr. McAvoy. The questions were surrounding whether or not I would follow the law of the land, whatever it was, Constitution, local statutes.

Senator SIMON. In the case of all three, it was the same question in the case of all three?

Mr. McAvoy. Yes.

Senator SIMON. If you could, to the best of your recollection, just rephrase a question they might have asked you?

Mr. McAvoy. Well, for example, if the death penalty were required to be imposed in your court, would you impose it? I said of course I would; I would follow the law, whatever it was at the time.

Senator SIMON. All right. I have no further questions, Mr. Chairman.

Senator McCONNELL [presiding]. The chairman has a few questions of you, Mr. McAvoy. During your career as a practicing attorney, your experience has been exclusively civil in nature. Now that you have been nominated to be a U.S. district judge for the northern district of New York, would you tell the committee what steps you have taken to prepare yourself for the criminal caseload that awaits you at the Federal district court?

Mr. McAvoy. Well, I have gone to Federal district court and observed criminal cases firsthand. I watched some sentencing, some arraignments. I have ordered tapes of substantive law on the criminal side and procedural law and listened to those.

I have gone to one seminar put on by the Federal Judicial Conference and I plan to attend another one next week.

Senator McCONNELL. What are your views on the primary purposes of the criminal justice system?

Mr. McAvoy. I think it is to protect those persons in society who follow the law and the rules.

Senator McCONNELL. How would you handle an instance in which counsel for one of the parties in your court was obviously not a skilled litigator and was not prepared to adequately represent the interests of his or her client?

Mr. McAvoy. I think I would call both attorneys to the bench, probably have a stenographer there to make a record, and tell that attorney how I felt about the situation and ask him to get other counsel.

Senator McCONNELL. Are there ever any circumstances where you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions can be detected either through the text of a provision or its surrounding legislative history?

Mr. McAvoy. Absolutely not.

Senator McCONNELL. Any other questions?

Senator SIMON. No, though I would, in the case of Mr. McAvoy and also in the case of Mr. Boggs, like to keep the record open. I may want to submit questions.

Senator McCONNELL. Fine.

Thank you, sir.

Mr. McAvoy. Thank you.

Senator McCONNELL. We will leave it open until 5:00 tomorrow afternoon, Senator Simon.

The next nominee, Judge Sidney Fitzwater, is going to be introduced by Senator Gramm and he is on the way. So we might just have a momentary recess here to allow Senator Gramm to get here.

[A brief recess was taken.]

Senator McCONNELL. We will reconvene the hearing. Senator Gramm is here. If you all could keep it down, we would appreciate it. We will now reconvene the hearing. Senator Gramm is here to introduce Judge Sidney Fitzwater.

Senator Gramm.

STATEMENT OF HON. PHIL GRAMM, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator GRAMM. Mr Chairman, I appreciate having an opportunity to come before the committee again to do something I have already done before, and that is to introduce Sid Fitzwater.

I do not feel I need to go through the lengthy discussion I did the last time we convened, but I would like to review some simple facts. No. 1, of all municipal, county, State and Federal judges in Dallas County, which is a huge county in my State, Sid Fitzwater was chosen by his peers, attorneys who practice before his court and who engage in the practice of law in Dallas County, as not just the No. 1 judge overall, but the No. 1 judge in each category in which judges were rated.

I think that is a remarkable achievement for a man who is the youngest district court judge in the history of our State, who has

had a remarkable career ranging from State debate champion to star law student to successful attorney to State district judge.

In everything he has ever done in his life, there has been one hallmark of that work: excellence.

I have a selection committee in my State that I put together that has a broad cross-section of distinguished attorneys. I have presidents of distinguished universities, I have people who are engaged in academic law, I have people who are with big law firms in big cities and people who are independent practitioners in little cities, and I have Democrats and Republicans on the committee.

In the selection process for this appointment in the northern district of Texas, that entire committee of 12 members voted unanimously that among all of the people who had applied to be considered for this position—many of those people are eminently qualified and would have been rated qualified by the bar—that Sid Fitzwater was the best applicant that we had to consider. I feel very strongly about this appointment. There really have been two concerns raised about Judge Fitzwater.

One concern is that he is young, and I submit that that concern is self-correcting. The one thing that we are guaranteed is if we do not die, we will get older. We may not get wiser, but we will certainly get older.

But I think if you look at his career—what he has done, what he has achieved and his record as a judge—you will see why the American Bar Association decided to find him qualified despite the fact that he will be the youngest Federal judge in the country, and I think that says something about the quality of the person that we have before us.

The second concern is a concern that has been raised with regard to an allegation about posting a sign where people vote. Sid has answered questions previously on this allegation and is certainly capable of doing it today.

I must say, however, from my own point of view—I am not a lawyer, but used to be an economist and now I am a politician. I never have understood why people get upset if you put up a sign that says do not violate the law, but I guess I am out of step with the thinking of others.

But in any case, that is an area that Sid certainly is capable of addressing, and it is my understanding that here with us today as a witness is the man who was county Democratic chairman during this election that is being discussed. It is my understanding that he is here to testify as well.

So I am happy to be here to introduce Sid Fitzwater. I believe he will be an outstanding Federal judge. I believe he will rise in the judiciary and that his appointment will not just be a credit to the President for nominating him, but will be a credit to this committee.

Senator McCONNELL. Thank you, Senator Gramm.

Judge Fitzwater, at your first hearing on November 22, the chairman asked you to tell the committee your role in the posting of election material at various polling places in the Dallas, TX, area. The signs posted informed voters of the consequences of voter fraud.

For the record, will you again tell the committee of your involvement in that incident?

TESTIMONY OF SIDNEY A. FITZWATER, OF TEXAS, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS

Judge FITZWATER. Thank you, Mr. Chairman. At the November 2, 1982, general election in Dallas County, I was a candidate for election to the 298th district court, having been appointed to that position earlier in the year.

Two days prior to the election on Sunday, October 31, 1982, I received a telephone call from Justice Pat Guillot, a judge on the Dallas Court of Appeals. I was not home at the time, but when I returned home I returned his telephone call.

At that time, Justice Guillot asked me to participate in an effort to help reduce voter fraud. He told me that the effort would consist of the posting of signs in polling places warning against the consequences of voter fraud.

He represented to me that the effort would take place throughout Dallas County in its entirety; that the effort had been approved by the Texas Secretary of State; that it had been approved by the Dallas County sheriff; and that there was a need for judicial candidates to participate because there were not enough volunteers to cover every precinct.

He indicated to me that for those precincts for which they could not get volunteers, the sheriff of Dallas County would utilize his deputies and that there were not enough deputies to cover all of the precincts, so that judicial candidates were being asked to help out with the rest.

Based on those representations, I agreed to participate. The next day, November 1, 1982, after completing a day of a jury trial that was in its second week—at the conclusion of that day, delivered to my chambers were nine signs; a list of precincts, with three precincts designated; and a cover letter from Justice Guillot.

The cover letter confirmed again that he had received the approval of the Secretary of State and the Dallas County sheriff for this effort. The signs were to be posted, three at each precinct, and I was, as I said, given a list of the precincts.

I had earlier in the day asked Judge Craig Enoch, a fellow State district judge, whether he had been asked to participate. Judge Enoch's name was mentioned to me in Justice Guillot's telephone call.

The first time in the day, Judge Enoch indicated he had not been contacted, but at the end of the day he indicated he had been. He had made other arrangements to post his signs that he had been given, so he agreed to accompany me in the posting of my signs.

The first polling place on my list was South Oak Cliff High School, which is located in south Dallas County. Judge Enoch accompanied me to that polling place that evening somewhere between the hours of 8:30 and 9:30 p.m. I posted three of the signs there at what I believed to be the main entrance to the high school.

I then drove to the other two polling places, but found that signs had already been posted there. I do not know by whom, and to this day do not know. Therefore, I did not post signs there.

I then proceeded to the next location and found that signs had already been posted there, so I did not post additional signs. I dropped Judge Enoch off at his house and I returned to my house with six extra signs.

Thereafter, a lawsuit was brought against the Texas Secretary of State, the Dallas County sheriff, the Dallas County election administrator, Justice Guillot, Judge Enoch, and myself, another State district judge, and a Dallas lawyer. The lawsuit made allegations concerning the activities in part that dealt with the signs and in part, I believe, with other matters.

Discovery was conducted in that case shortly after the time that the lawsuit was filed, which was some time in November 1982 through May 1983. My deposition was taken as part of the discovery.

In May 1983, the plaintiffs agreed by consent voluntarily to drop as defendants Judge Enoch, the Texas Secretary of State, and me. Shortly after that, the U.S. district court dismissed the entire lawsuit for lack of standing and lack of subject matter jurisdiction, as I understand the court's order.

That is the extent of my involvement.

Senator McCONNELL. I would like to offer for the record a copy of a letter from Edward Cloutman III, attorney for the plaintiffs in the case brought before the Federal district court.

The letter states as follows: "Please be advised that by consent, the following persons were dismissed as defendants in the above-styled and numbered case prior to the district court's order dismissing plaintiff's cause," and it lists David Dean, yourself, and Craig Enoch.

It should also be pointed out that the case brought against the remaining defendants was dismissed by Federal district court order dated June 1, 1983, as you mentioned. In this order, District Court Judge Robert W. Porter stated:

It is ordered that the defendants' motion to dismiss for lack of standing and for lack of subject matter jurisdiction is granted and that the above-entitled and numbered case is dismissed.

We will include the court order in the record, also.
[Committee insert follows:]

MULLINAX, WELLS, BAAB & CLOUTMAN, P.C.

ATTORNEYS AT LAW

8204 ELMBROOK DRIVE/SUITE 200/P.O. BOX 47972/DALLAS, TEXAS 75247-0972
PHONE (AC 214) 630-3672 / IN FT. WORTH CALL 263-1547

July 12, 1983

EDWARD B. CLOUTMAN, III

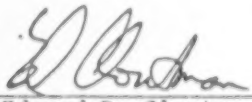
Mr. Gilbert F. Ganucheau
Clerk, U.S. Court of Appeals
for the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130RE: Jackson, et al vs.
Drake, et al
Case No. 83-1461
District Court No.
CA3-82-1830-F

Dear Sir:

Please be advised that by consent the following persons were dismissed as defendants in the above styled and numbered cause, prior to the District Court's order dismissing plaintiffs' cause:

1. David Dean;
2. Sid Fitzwater; and
3. Craig Enoch.

Very truly yours,

MULLINAX, WELLS, BAAB
& CLOUTMAN, P.C.By: 

Edward B. Cloutman, III

/klp

cc: All Counsel of Record



Rec'd
1-30-86
2:55pm
PSK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ISSAC JACKSON and JOYCE
WASHINGTON

VS.

CONNIE DRAKE, et al.

)
)
)
)
)

NO. CA3-82-1830-F

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

FILED

JUN 1 1983

NANCY HALL DOHERTY, CLERK

By

Pamela J. Lee
Deputy

ORDER

This case, brought on behalf of all black citizens and voters of Dallas County, alleges a denial and breach of the right to vote. On May 16, 1983, a hearing was held to consider various outstanding motions in this case. The parties' discussion of the issues indicated that the Defendants' challenge to the jurisdiction of this Court is the threshold issue of the entire cause of action. The briefs and arguments of counsel support this conclusion.

FACTS

On November 2, 1982, Dallas County, Texas, conducted a general election for the election of county, state and national public officials pursuant to state and federal law. Defendant Connie Drake, the Dallas County Election Administrator, was responsible for the printing of and allocation of ballots to election precincts throughout the city. The manner of distribution of the ballots resulted in shortages of ballots in many precincts prior to the time designated by law for the polls to be closed. Plaintiffs allege that a shortage

of ballots occurred only in predominately black precincts, thereby abridging the constitutional right to vote of the black community. During the same election, signs were posted under the direction of Dallas County Sheriff Don Byrd in Dallas County precincts stating in part "You may be imprisoned." These signs were placed within the 100 foot distance markers at the place of polling. Plaintiffs contend that the signs were distributed primarily in predominately black precincts for the purpose of intimidating, threatening or coercing black voters not to vote in an effort to interfere with the exercise of the right to vote. Issac Jackson and Joyce Washington, both black American voters registered in Dallas, brought this lawsuit to enjoin the above practices and to prevent any further attempts to intimidate the black voting population.

MOTION TO DISMISS

The primary issue before the Court is whether the Plaintiffs have sufficient standing to invoke this Court's jurisdiction. Discovery has disclosed that both Issac Jackson and Joyce Washington voted in the general election held on November 2, 1982. The alleged shortage of ballots did not affect their exercise of their right to vote. Furthermore, neither Issac Jackson nor Joyce Washington saw or had any knowledge of the allegedly intimidating or coercive signs prior to or at the time they exercised their right to vote in the election. Plaintiff Washington, an election clerk in her precinct, never saw a sign upon her arrival at

the precinct or upon her departure. She admits first witnessing a sign later only on television. She does not know of anyone personally who saw the sign and did not vote, or of anyone who did not vote because of a ballot shortage.

Plaintiff Jackson, chairperson of the Dallas AFL-CIO Counsel Civil Rights Committee and an official in the United Democrats, also could not name anyone who was harrassed or kept from voting. He admitted that he first saw a sign days after the election and received only a second-hand report on election day that signs were up.

In order to invoke this Court's jurisdiction, a litigant must establish an injury in fact resulting from the challenged activity. Warth v. Seldin, 422 U.S. 490 (1975); Data Processing Service v. Camp, 397 U.S. 150 (1970); Baker v. Carr, 369 U.S. 186 (1962). It is insufficient that Plaintiff merely suffered in some indefinite way in common with people generally. The Plaintiff must allege such a personal stake in the outcome of the controversy to warrant his invocation of federal court jurisdiction and to justify the exercise of the court's remedial powers on his behalf. Baker v. Carr, supra at 204 (1962). The Article III judicial power exists only to redress or otherwise protect against injury to the complaining party, even though the Court's judgment may benefit others collaterally. Ibid. In this case, Plaintiffs fail to meet the critical initial test of jurisdiction. Both Plaintiffs voted. Neither the alleged ballot shortages

nor the alleged posting of signs interfered with the right to vote in any way. Therefore, an "injury in fact" has not been shown.

Plaintiffs argue that all that has to be shown for a violation of any voting statute is the attempt to intimidate, threaten or coerce voters with the ultimate purpose of interfering with the right to vote. This Court agrees with Plaintiffs' literal reading of the applicable statutes. However, Plaintiffs fail to show attempts to threaten their own right to vote. Ballot shortages were non-existent when they voted. Signs in question were not seen until days after the election. Thus, even an attempt to abridge their rights is absent.

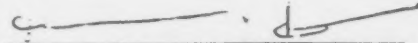
Plaintiffs attempt to justify jurisdiction by arguing that any attempt to interfere with blacks right to vote would interfere with Plaintiff's individual efforts to organize and encourage minority voters to get out and vote and would also dilute Plaintiffs' overall voting strength. Again, Plaintiffs have failed to show a real and immediate injury to themselves. Organization of minority voters has not been shown to be impaired, and dilution of voting strength can only be theoretically alleged as a matter of speculation. Since neither Plaintiffs nor anyone within their personal knowledge was affected by the alleged actions of the Defendants, Plaintiffs have not suffered these identifiable injuries.

Plaintiffs have asked this Court to consider certifying a class that might encompass members which shared Plaintiffs' injury and in effect bootstrap jurisdiction in Plaintiffs'

favor. To have standing to sue as a class representative, it is essential that Plaintiffs be part of that class, that is, possess the same interest and suffer the same injury shared by all members of the class they intend to represent. Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 217 (1974). Assuming that minority voters from the public sector exist who were intimidated or failed to vote because of ballot shortages, class certification through the Plaintiffs would not be appropriate. Plaintiffs' absence of injury in fact negates their ability to represent any possible class of aggrieved victims. Inclusion of class action allegations in the complaint does not relieve the Plaintiffs themselves of meeting the requirements for constitutional standing, even if persons described in the class definition would have standing themselves to sue. Brown v. Sibley, 650 F.2d 760, 771 (5th Cir. 1981). The jurisdictional door to this Court, initially has not been opened.

Accordingly, it is ORDERED that Defendants' Motion to Dismiss for Lack of Standing and for Lack of Subject Matter Jurisdiction is granted and that the above entitled and numbered cause is dismissed.

Signed this 1st day of June, 1983.


UNITED STATES DISTRICT JUDGE

Senator McCONNELL. Judge Fitzwater, as far as you were aware, the posting of these signs had been cleared by the Texas Secretary of State and by the Dallas County sheriff. Now, was there any reason for you to believe otherwise, and if so, please explain.

Judge FITZWATER. No, Mr. Chairman, there was no reason for me to believe otherwise. As I previously testified, Justice Guillot represented to me orally that the effort was approved and, in addition, he set forth those representations in a letter that I mentioned that accompanied the signs and the precinct list.

If I may, Mr. Chairman, I brought the letter with me—

Senator McCONNELL. I was going to ask you if you had a copy of it.

Judge FITZWATER. I would like to read that, if I may, at this time.

Senator McCONNELL. Please do.

Judge FITZWATER. It is on the letterhead of Pat Guillot:

Governor Clements' ballot security chairman requested that all of his judicial appointments help out in the effort to keep voting fraud to a minimum. You are requested to post these posters in the polling places early tomorrow. Your precincts have been circled.

I talked with David Dean and Sheriff Byrd, Friday and cleared this with them. Remember, when you discourage voting fraud, you gain votes, too.

And it is signed Pat Guillot.

Senator McCONNELL. Judge Fitzwater, were you aware of any statutes or election codes that were violated by posting these signs?

Judge FITZWATER. None that I know of, Mr. Chairman.

Senator McCONNELL. I have a letter from Theodore Steinke, who is assistant district attorney, chief of the public integrity section, specialized crime division, in Dallas County.

The letter states in part:

This office decided to investigate the sign postings after receiving several complaints alleging that the signs which warned voters that they could be imprisoned for violating the Texas Election Code—that is, voting twice, electioneering, influencing other voters—were placed in South Dallas precincts specifically to intimidate and disenfranchise minority voters.

While I cannot discuss the specifics of our investigation, I can tell you that these signs appeared not only in some South Dallas precincts, but also in some North Dallas ones, and that there was no evidence that the signs were placed in the polling places specifically to intimidate or disenfranchise voters.

This office concluded there was no violation of the Texas Penal Code or the Texas Election Code which, in fact, neither permits nor prohibits such signs. As I said before, the grand jury took no action on this matter.

I would like to have that entire letter printed in the record at this point.

[Committee insert follows:]



DALLAS COUNTY
DISTRICT ATTORNEY
Specialized Crime Division



1986 FEB -6 PM 1:30

January 29, 1986

Senator Strom Thurmond
Chairman, Senate Judiciary Committee
Washington, DC 20510

ATTENTION: Frank Klonoski

RE: Investigation of the 1982 General Election in Dallas County

Dear Mr. Klonoski:

Pursuant to your telephone request of January 21, 1986, I am writing this letter to confirm the investigation of the 1982 General Election in Dallas County, conducted by this office and the Dallas County Grand Jury, specifically as regards the placing of warning signs in a number of Dallas County polling places. The placing of those signs was one (1) of eighteen (18) matters subject to a seven (7) month investigation by this office, culminating in a lengthy review by the Grand Jury which ended on July 1, 1983; the Grand Jury declined to return indictments or take any action on any of the eighteen (18) matters.

This office decided to investigate the sign postings after receiving several complaints alleging that the signs, which warned voters that they could be imprisoned for violating the Texas Election Code (e.g., voting twice, electioneering, influencing other voters, etc.), were placed in South Dallas precincts specifically to intimidate and disenfranchise minority voters. While I cannot discuss the specifics of our investigation, I can tell you that the signs appeared not only in some South Dallas precincts, but also in some North Dallas ones; and that there was no evidence that the signs were placed in the polling places specifically to intimidate or disenfranchise voters. This office concluded that there was no violation of the Texas Penal Code or the Texas Election Code (which in fact neither permits nor prohibits such signs). And as I said before, the Grand Jury took no action on the matter.

I wish I could be more detailed in this letter, but State law prohibits the disclosure of all proceedings held before the Grand Jury, including the testimony and evidence presented to it. If you require anything further, please advise.

Sincerely,

THEODORE P. STEINKE, JR.
Assistant District Attorney
Chief, Public Integrity Section
Specialized Crime Division

TPS/vgt

Senator McCONNELL. Judge Fitzwater, there has been an allegation that these signs incorrectly stated the law regarding voter fraud. Would you tell the committee what the signs stated, and were they, in fact, derived from Texas law?

Judge FITZWATER. The sign started out as follows, in smaller, black type: "Do not remove this sign by order of the sheriff of Dallas County." Then in large, red type it said, "You can be imprisoned," and then under that in black type, in smaller type, "Number one, if you offer, accept or agree to offer or accept money or anything else of value to vote or not vote; two, if you influence or try to influence a voter how to vote; three, if you vote without being registered; four, if you let a person vote more than once; five, if you vote with someone else's registration; six, violate Texas Election Code or Texas Penal Code."

Then underneath that in larger, red type it again said, "Don't risk it; obey the law." Now, as to your—

Senator McCONNELL. Here is a copy of what you are talking about. I understand Senator Biden also has the actual poster here. For those of you in the audience, this is what we are talking about.

Go ahead, Judge Fitzwater.

Judge FITZWATER. As to whether or not the particular items in the sign were derived from Texas law, in my research of the matter, which took place after the incident in question, I found the following.

With respect to item No. 1, "if you offer, accept or agree to offer or accept money or anything else of value to vote or not vote," in November of 1982, section 36.02(a)(1) of the Texas Penal Code, entitled "Bribery," provided in pertinent part—

A person commits an offense if he intentionally or knowingly offers, confers or agrees to confer on another or solicits, accepts or agrees to accept from another any pecuniary benefit as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official or voter.

The offense of bribery was a second-degree felony punishable by imprisonment for a term of 2 to 20 years.

The second item, "if you influence or try to influence a voter how to vote"—I might make an observation with respect to this item and item No. 4. In my review of the sign, I believe that these two particular items were directed to election officers as opposed to voters.

I think that is true because of the way the sign reads, and also because of where the signs were to be placed.

In November of 1982, article 15.24 of the Texas Election Code, entitled "Influencing Voter," provided—

Any judge, clerk or other person who may be in the room where an election, either primary, special or general, is being held who there indicates by word or sign now he desires a citizen to vote or not to vote shall be fined not less than \$200 nor more than \$500 and be confined in jail not less than 10 nor more than 30 days.

The period of imprisonment for that offense, as set forth in the statute, is 10 to 30 days.

No. 3, "if you vote without being registered," in November 1982, article 15.41 of the Texas Election Code, entitled "Illegal Voting," provided—

If any person knowing himself not to be a qualified voter shall at any election vote for or against any officer to be then chosen or for or against any proposition to be determined by said election, he shall be guilty of a third-degree felony.

Pursuant to article 5.02(a) of the Election Code, a qualified voter was a person who, among other things, "has complied with the registration requirements of this code." In November 1982, a third-degree felony was punishable by imprisonment for a term of 2 to 10 years.

Item No. 4, "if you let a person vote more than once"—as I indicated previously, Mr. Chairman, it appears to me that this item, like item four, is directed to election officers.

In November 1982, article 15.42 of the Texas Election Code, entitled "Instigating Illegal Voting," provided—

Whoever shall procure, aid or advise another to give his vote at any election, knowing that the person is not qualified to vote, or shall procure, aid or advise another to give his vote more than once in such election shall be guilty of a felony of the third degree.

In November 1982, a third-degree felony was punishable by imprisonment for a term of 2 to 10 years.

Item No. 5, "if you vote with someone else's registration," in November 1982, article 15.48 of the Texas Election Code, entitled "Falsely Personating Another," provided—

Whoever attempts to falsely personate in an election another person and vote or attempt to vote on the authority of a voter registration certificate not issued to him by the county's registrar of voters shall be confined in the penitentiary not less than 3 nor more than 5 years.

So the period of imprisonment, 3 to 5 years, is set forth in the statute.

Finally, item No. 6, "violate Texas Election Code or Texas Penal Code," in November 1982, there were various provisions of the Texas Election Code and election-related provisions of the Texas Penal Code for which one who violated the codes could be punished by imprisonment.

Senator McCONNELL. Thank you, Judge Fitzwater. There has also been an allegation that the placing of these signs was an attempt to intimidate minority voters at the polling place. How would you respond to that allegation?

Judge FITZWATER. Mr. Chairman, I can state unequivocally that I had no personal intent nor was I attempting to intimidate minority voters.

Senator McCONNELL. Thank you.

Senator Biden.

Senator BIDEN. Thank you.

Judge, welcome. Let me ask you a couple of questions, if I may. What time did the polls open in Texas on the day in question?

Judge FITZWATER. Seven a.m.

Senator BIDEN. And did you post the three signs you posted that day?

Judge FITZWATER. I did not, Senator Biden.

Senator BIDEN. The night before?

Judge FITZWATER. I did.

Senator BIDEN. Do you agree that there could be some circumstances in which one could place a notice that stated the law that might, in fact, evidence a lack of good judgment?

For example, I doubt whether people like myself who do not think we should be encouraging abortion think it would be a good idea for a judge to post in front of a Planned Parenthood office, "Under the Constitution, before you walk in this door, you should understand you have the right to ask for and get an abortion."

I doubt whether Senator Gramm would think that was a good idea. It is just stating the law. I know I would not think it was a good idea. I do not think it would be a good idea to post in cafeterias of high schools a sign saying "Some of you will soon turn 18," depending on your State; in my State, that was the drinking age. "The law states that once you turn 18, you have a right to go down the corner to the nearest liquor store and buy whatever spirits and beverages you would like to consume."

I doubt whether most of us in the Senate would suggest that it would be a good idea for a judge to go down and post what the law was. That is just stating the law. So I guess what I am driving at is I want a sense—there is no question about your credentials. I think you are an impressive guy.

Your credentials, based on comments from those who appeared before you, are exemplary. Far be it from me, having been elected to the U.S. Senate at 29, to consider age an impediment to hold a high public office, and I consider the Federal judiciary the highest of those public offices.

So my only concern about you is whether or not you, within the broad category of judicial temperament, have at least a sense and understanding of why some people might get upset about you posting a sign that might in fact, state the law.

Let us assume you are right about item two and item four, and that a reasonable person would assume they were admonitions directed at the officials rather than those about to come into the polling place.

So, really, what I would like to discuss with you a few minutes is your sense of history, your sensitivity. Let us begin by talking a little bit about whether or not you are aware that in Texas and in Delaware, by the way, which, like Texas, to our mutual great shame—were segregated by law. We engaged in contrivances to prevent black people from voting and participating prior to and since Reconstruction. We both have a long history to be ashamed of in that very narrow area of encouraging black women and men to participate.

You are aware of that history, are you not?

Judge FITZWATER. I am, Senator

Senator BIDEN. And are you aware that during this same period of time, late seventies, early eighties, there had been cases where, in other States, in other regions, there have been some activities that would at least raise some eyebrows, like signs being posted with people actually carrying weapons saying you cannot violate the law in minority precincts?

Are you aware of the controversy that surrounded that in New Jersey and in other States? Were you aware of that at the time or are you aware of it now?

Judge FITZWATER. Not that particular instance, Senator.

Senator BIDEN. Are you aware of instances? Have instances been brought to your attention, subsequent to your posting the signs,

where there are at least questions about the propriety, if not the legality, of antifraud activities on the part of political parties or individuals?

Judge FITZWATER. I am aware of general discussions concerning that.

Senator BIDEN. And do you believe that there is more voter fraud in black precincts than in white precincts?

Judge FITZWATER. No; and I have no basis to believe that.

Senator BIDEN. Can you think of a circumstance under which stating the law or acting within the technical limits of the law could be read, as a consequence of the historical background of the community, the precinct, the neighborhood, as having an intimidating influence on people going to the polls?

Judge FITZWATER. Well, I happen to be one who believes that all things are possible, Senator, and in that particular circumstance, yes, there could be. I suppose that with respect to my involvement, what I have to come back to is the fact that it was represented to me that this effort would take place throughout Dallas County.

This is not a situation where there is a shred of evidence that it was told to me, we are going to post signs only——

Senator BIDEN. I happen to agree with you. Let me get to the end here. I have great difficulty voting against you. The only caveat I have, quite frankly, is the degree of your sensitivity.

I want you to talk with me a little bit about whether or not there are circumstances under which you understand that black folks and Hispanics and others could be, even though technically they were not being told they could not vote——

Judge FITZWATER. Of course, that is true, Senator.

Senator BIDEN. I just want to talk through some of those examples. We will stay out of Texas.

Judge FITZWATER. Well, an example that I know of in the early days is the despicable practice where a white person who could hardly read or write could pass the test to vote, but a black person who had a good education and could read and write was flunked on a test of ability to read and write.

Senator BIDEN. OK, let us take it a step further. Let us assume that it was technically within the confines of the geographically defined precinct in Skokie, which is overwhelmingly Jewish, as I understand it——

Senator SIMON. That is correct.

Senator BIDEN. Let us assume on the fringe of the neighborhood of Skokie there was an enclave of people who had a long history of being racist about Jews. That was the local headquarters of the local Nazi organization, which is allowed to exist in America, as it should be allowed to exist; we can say whatever we want in America.

As a judge, would you think there was anything that would be indirectly intimidating in putting the polling place next to the Nazi headquarters in a predominantly Jewish neighborhood, even though they are in the same precinct or same area?

Judge FITZWATER. Could be.

Senator BIDEN. Could be or would be? I mean, what would you do?

Judge FITZWATER. What would I do?

Senator BIDEN. Yes. I mean, let us assume you had the choice of determining—I mean, would you not make the case that that is a bad idea to put a polling place in a predominantly Jewish neighborhood next to a storefront that is rented by the Nazis?

Judge FITZWATER. Yes.

Senator BIDEN. OK, good I am not trying to trap you. How old were you at the time this occurred?

Judge FITZWATER. Twenty-nine.

Senator BIDEN. Twenty-nine years old. I get the feeling you are on the bench and you get a phone call from a colleague and you said, you know, you are going to, in effect, join the team and go out there and do this. Based on the evidence that our investigators have been able to find out, there is no reason to believe that you thought that this was illegal.

There is no reason I can find to indicate that you knew that the Secretary of State did not sanction this or that you knew that the sheriff's office did not authorize this. It seems to me that you came along—basically, though, some of your other colleagues who were asked to do the same made judgments that it was not particularly prudent for a sitting judge to go out posting signs, and there are at least three of them.

You are aware of them. Knowing how bright and capable you are, I assume you have researched all this even better than we have, so you know that there are several.

If you were a sitting Federal judge and you were asked to participate, even if the Secretary of State said it was a good idea, even if the sheriff's office had authorized it, would you think it prudent for you to be going out and post signs?

Judge FITZWATER. May I answer that two ways, Senator Biden?

Senator BIDEN. Sure.

Judge FITZWATER. First of all, the context in which the issue was raised is vastly different in a State system that has partisan election of judges where judges are expected to participate in the partisan process and in the Federal judiciary which is not nonpartisan and not elected.

Senator BIDEN. Valid point. I keep thinking everyone has the wisdom we have in Delaware of having appointed judges. I forgot. I think it is a valid distinction.

Judge FITZWATER. Second, the Federal judge does not participate in a partisan way. The Federal judge—

Senator BIDEN. Is that partisan? Was that a partisan effort?

Judge FITZWATER. Well, in hindsight, it was a partisan effort, and I say that speculating that the involvement was by the Republican party or by Republican workers. I do not know that, but to be candid in answering your question, my speculation is it was a partisan effort.

But as a Federal judge—and you are attempting, I think, Senator, to predict what is my behavior going to be like in the temperament area—absolutely, positively would I not participate in such an activity.

Senator BIDEN. Let us say you stayed on the bench of the State court, which is elected. Knowing all you know now, would you do it again this upcoming election? Would you post signs like that or similar to that in precincts?

Judge FITZWATER. No.

Senator BIDEN. That is good enough for me. I yield the floor. By the way, Senator Gramm and I at some point ought to talk about posting signs. I would be curious. You would not like to see a sign posted in front of Planned Parenthood?

Senator GRAMM. I do not think people read them.

Senator BIDEN. Oh, OK.

Senator GRAMM. I do not spend my campaign money on signs.

Senator McCONNELL. Senator Simon.

Senator SIMON. Thank you, Mr. Chairman. In Illinois, we read signs, Senator Gramm.

I have expressed to my colleagues on this committee some real concerns about the level of quality of the nominations we are receiving. Yours is an above-average nomination, and I say that to commend you.

In the matter we are referring to was this an election in which you were a candidate?

Judge FITZWATER. Yes, Senator.

Senator SIMON. Justice Guillot—how do you spell that?

Judge FITZWATER. G-u-i-l-l-o-t.

Senator SIMON. Alright, and he was a——

Judge FITZWATER. Justice on the Dallas court of appeals.

Senator SIMON. Alright. The one question my colleague has touched upon, and that is whether you are sensitive to this kind of situation, whether you would do it again—the second fairly fundamental question is are you sensitive to this racial equation?

I want to feel that if you sit on that Federal bench, you are going to treat blacks and Hispanics or Japanese-Americans or anyone else who comes before you fairly. Do you have any way of responding, in your background, that you have a sensitivity to that part of the equation?

Judge FITZWATER. Senator, you asked me at the first hearing had I done anything for the poor, and at that time I explained to you that there was a young individual that I had helped out in high school; that I had paid for his graduation announcements, that I had paid for his cap and gown because he was the first in his family to graduate.

I did not mention that he was black at the time that I testified because I do not believe in making distinctions like that or describing people by color, and if you read the transcript you will find that that is not there, but he was.

And through my church, I made the contact with him; I worked with him to help him to improve his reading skills so that he could graduate. I helped him in this way with respect to graduating from high school and I helped him when he enrolled in junior college.

I was brought up in a family where we were taught to be sensitive to people of all races. I do not want to go too much further because it almost sounds inappropriate to say, but it is true that two of my father's closest friends were black colleagues in education.

We were taught respect for human beings. We were taught not to make race-based decisions, and that is my answer to your question. That is why when I answered your question in the first hear-

ing I did not mention his race because I do not believe in making that distinction.

Senator SIMON. I have no further questions, Mr. Chairman.

Senator BIDEN. Can I ask one question here?

Senator SIMON. You bet.

Senator BIDEN. Explain to me what you think our motivation was in being concerned about this sign, seriously. You are under oath. Give me a straight answer.

Judge FITZWATER. Political

Senator BIDEN. Do you still think it is?

Judge FITZWATER. I cannot—that is my first reaction, Senator, but now observing what is your obvious sincerity, no, I do not believe that is the only motivation.

Senator BIDEN. Why do you think other people are upset? Do you think it is just totally political or do you think that they are just so conditioned to this kind of thing that—do you believe a reasonable person, just being exposed to the initial facts, be suspect of you being on the bench? Can you see that?

Judge FITZWATER. When you say initial facts, do you mean—

Senator BIDEN. You, a judge, out there posting a sign that, in fact, turns out to be in black precincts saying you can go to prison.

Judge FITZWATER. And know nothing else?

Senator BIDEN. Yes.

Judge FITZWATER. Yes, I can see that.

Know nothing else about me?

Senator BIDEN. Yes.

Judge FITZWATER. Yes.

Senator BIDEN. Why can you see it? What makes you say you can see that?

Judge FITZWATER. Well, given the history, as you have recounted it, of the suffrage, the right to vote, among minorities, given a fear that in the past it has been de jure rather than de facto, I can see that.

That is why I have to come back to the fact that had it not been for represented approvals by the appropriate people and the belief that it was countywide, I would not have done it. I had no desire to focus it and, in fact—

Senator BIDEN. I came in here with a very negative view of you, knowing what I know, and I must tell you, you have impressed me. See, one of the things that disturbs me is that there is a growing notion, it seems, in this country—Democrat, Republican; it seems to be across party lines—that somehow as long as everything goes by the numbers, we need do nothing else.

For example, the notion in another case, which I will not bore you with, where moving the polling place to the same courthouse where people who are black used to have to, you know, walk in the back door and used to get the living bejappers beaten out of them in prior historical contexts, some people cannot understand.

They sit there as if there is no past and say, well, wait a minute; there is no law now, the courthouse is open to all people now. What is the problem? And they probably mean it, without understanding that that 65-year-old man who has to walk across town and go through the neighborhood and walk up to that same court-

house he used to be dragged out of—it might be a psychological impediment for him to vote.

It is important to me that women and men who are on the bench not agree with me politically, but at least understand, which you seem to, that the context in which certain things are done tends to color people's reaction and make them wonder about the motivation of the person who is doing it, notwithstanding that it may be, by the numbers, precisely legal.

Do you follow me? I mean, do you agree with the essence of what I am saying?

Judge FITZWATER. Well, I can see your point, and what I want to be careful of is that you do not think that I assume that that is what happened in this case, because I do not know.

Senator BIDEN. No.

Judge FITZWATER. But I agree with what you are saying.

Senator BIDEN. By the way, I do not know that it has happened in this case. Apparently, there are going to be people here testifying who will make the case that it did and people who will make the case that it did not, and I am just going to listen to them.

But based on what you have said to me under oath, I must tell you that I feel more reassured about you than I did before we sat down, and that is because of your explanation.

I am sorry for the interruption. I yield to my colleague from Ohio.

Senator METZENBAUM. Mr. Fitzwater, I came late because there was a Budget committee meeting and I thought since your sponsor created all the problems in connection with that committee, it was understandable that I would be there before I got here. So I may have some repetition.

As I understand it, it can be stipulated that the signs were posted with much greater frequency in black precincts in Dallas County than they were in white precincts, is that correct?

Judge FITZWATER. I do not know that that is true, Senator.

Senator METZENBAUM. Well, is it not a fact that of 400 precincts in Dallas, only 80 signs were posted and 90 percent of the black precincts were posted, but only 10 percent of the other precincts were posted?

Judge FITZWATER. I have heard that, Senator, but I do not know that that is true.

Senator METZENBAUM. And if I told you that William Bradford Reynolds said in his letter to Connie Drake in Dallas County:

Our investigation confirmed that signs warning voters of the possible repercussions of illegal voting were posted by sheriff's deputies and other individuals at a number of precincts in the county; the information we have indicates that most of the signs were placed at precincts where black voters were assigned to vote.

And it goes on—have you seen that letter?

Judge FITZWATER. I have not, Senator.

Senator METZENBAUM. On the basis of his statement, could we then agree that that was the fact?

Judge FITZWATER. Senator, I do not know where he got his information. I do not know who he talked with, and so forth. If you want me to assume it for the sake of argument, I will, but I just simply cannot agree that that is the fact.

Senator METZENBAUM. Well, is it the fact that all of the signs you posted were in black precincts?

Judge FITZWATER. That is the fact.

Senator METZENBAUM. Now, it is my understanding that before I got here, you made some statement indicating that it states the law. Am I correct?

Judge FITZWATER. Well, I responded to the chairman's question. The question, as I understand it, was whether or not the statements on the sign were derived from State law and I went through an explanation of where I thought the statements were derived from.

Senator METZENBAUM. And would you say some of the statements on the sign misstate the law?

Judge FITZWATER. Well, if you mean by "misstate" are they verbatim statements of the law, none of those—

Senator METZENBAUM. No, I do not mean that. Is it something of value to get a ride to the polling place? According to this, that would be something of value accepted and you would then be violating the law.

If you talked to somebody and told them, Mr. Fitzwater, I think you ought to vote for Phil Gramm, that is not violating the law, is it?

Judge FITZWATER. If you are saying that outside the 100-foot marker of the polling place?

Senator METZENBAUM. There is nothing in here about saying it inside the 100-foot marker; there is nothing about that. You are adding a condition that is not on the sign.

Judge FITZWATER. I was answering your question, Senator.

Senator METZENBAUM. OK.

Judge FITZWATER. I may have misunderstood the question.

Senator METZENBAUM. Well, my question is, this is not the law, is it?

Judge FITZWATER. Those exact words?

Senator METZENBAUM. That is right.

Judge FITZWATER. Those exact words are not a statement directly in exact words from the Texas Election Code or the Texas Penal Code.

Senator METZENBAUM. Never mind whether they conform with what the Texas law says specifically. I am saying to you that you can offer something of value, such as a ride to the polling place, and not violate the law. Is that not so?

Judge FITZWATER. If it is in exchange for the person's vote in a particular way?

Senator METZENBAUM. That is not what this says. "If you offer, accept or agree to offer or accept money or anything else of value to vote or not vote."

Judge FITZWATER. As I understand your question, if the person who is being given the ride says I will vote if you will do this and give me this thing of value, then that would be a violation.

Senator METZENBAUM. But that is not what this says.

Senator GRAMM. Excuse me for injecting—

Senator METZENBAUM. Senator, I wonder if you would be kind enough to let me inquire of the witness on my own. I do not mean

to be disrespectful to you and I will be very happy to ask you some questions, if you would like.

Senator GRAMM. I was only going to suggest, Senator, that he read the law. He has the law there that relates——

Senator METZENBAUM. No. He wants to be a judge and he is a judge. I do not think he has to read the law in order to tell us what the law is, and I am saying that you can try to influence a voter on how to vote.

You can go to some voter and say I think you ought to vote for Phil Gramm or against Phil Gramm. That does not violate the law. Yet, you say on this sign, and you put it up, you can be imprisoned for going over to somebody and saying, look, Phil Gramm is the best person to vote for for the U.S. Senate, or the worst person, whatever your opinion happens to be. Is that not right?

Judge FITZWATER. Well, given where the signs were to be placed, that is not correct. The signs were to be placed in the polling places, and in the polling place it would be a violation to electioneer and it would be a violation for an election officer to do just that.

Senator METZENBAUM. Where did you place the signs?

Judge FITZWATER. On the entrance doors to the South Oak Cliff High School—what I thought were the entrance doors to the polling place.

Senator METZENBAUM. Is that considered to be in the polling place?

Judge FITZWATER. I would not call it in the polling place.

Senator METZENBAUM. So, therefore, you could influence somebody until they got inside the polling place, could you not?

Judge FITZWATER. No, Senator. Under Texas law, you cannot influence someone within 100 feet of an entrance through—as it reads, something to the effect of a doorway entrance into a polling place.

Senator METZENBAUM. Would it be illegal to say to somebody, look, I want to see that you get to the polls and if you need a babysitter, we will help you get one or I will come over and sit for you? Would that be illegal?

Judge FITZWATER. Well, if I may refer to the election law as it was in November 1982, I have a question about that because if you are hiring a vehicle or hire a person to operate a vehicle for the purpose of conveying voters to the polling place, or reward any person in money or any other thing of value for procuring a vehicle or a driver for such purpose, you are subject to fine.

Senator METZENBAUM. If you do what? What was the first phrase?

Judge FITZWATER. I am referring to article 15.71; it is entitled "Hiring Vehicle to Convey Voters." "Whoever hires any vehicle or hires any person to operate a vehicle for the purposes of conveying voters to the polling place or rewards any person in money or other thing of value for procuring a vehicle or a driver for such purpose shall be fined not exceeding \$500."

Senator METZENBAUM. That is obviously not our case. I am talking about your offering to babysit for somebody.

Judge FITZWATER. No, I do not think that would be a violation.

Senator METZENBAUM. Now, the fact is that when this sign was on the door, people did not know whether it was applicable inside the booth, outside the booth, or what. You just had a big sign saying "you can be imprisoned."

What bothers me, Mr. Fitzwater, is I do not know whether you technically violated the law or not. But as I understand it, you are a sitting judge?

Judge FITZWATER. That is correct.

Senator METZENBAUM. What bothers me is the judicial temperament. If you happen to be one of the political people who gets involved and participates and somebody asks you to post signs, I can understand that you may not understand exactly the implications.

But you are a judge, you are a lawyer, and you aspire to be on the U.S. district court. What bothers me is not the technical question of did it violate the law, did it not violate the law.

I am much more bothered than my colleague from Delaware about your sensitivity about the implications of what you were doing—putting out a sign saying you can be imprisoned for doing any of these things? Is this really what I am trying to do to discourage voters, and is there not something funny about this that I am to put them up only in those black precincts?

I do not really care whether it is legal or illegal in the context of this hearing. In the context of this hearing, I am concerned about what kind of sensitivity this young man who aspires to be a Federal judge has with respect to the propriety of his conduct.

You get a letter from Pat Guillot, handwritten. Governor Clements' ballot security chairman requested that all his judicial appointments help out in the effort to keep voting fraud to a minimum. "You are requested to put these posters in the polling places"—underline "in"—"in the polling places early tomorrow. Your precincts have been circled."

Should that not have sent a flag to you, which precincts had been circled? We know which are black precincts and which are white precincts and which are Hispanic precincts.

It goes on to say, "I talked with David Dean and Sheriff Byrd Friday and cleared this with them." He did not say that they said it was legal; he said he talked with them. "Remember, when you discourage voting fraud, you gain votes, too."

In your deposition, you stated that you looked at the sign five times before you posted it. Did you not feel some obligation to say maybe I should not do it? Maybe it is not the right thing to do; maybe the implication of posting it in a black area and not in the white areas—if it was the right thing to do, then why were we not posting them in every precinct in the county?

Judge FITZWATER. Senator, it was represented to me the night before that they would be placed throughout Dallas County. I have previously testified that if the representation had been made that they would be posted only in minority areas of Dallas County, I would not have participated.

Senator METZENBAUM. You knew this was not an official State program, did you not?

Judge FITZWATER. I knew it was not?

Senator METZENBAUM. Yes.

Judge FITZWATER. Correct.

Senator METZENBAUM. You knew that it was a partisan effort and you knew it was a Republican-affiliated operation, and you knew that this was the kind of effort the Republican Party would be interested in, correct?

Judge FITZWATER. I feel those are generally true, yes, sir.

Senator METZENBAUM. Did you say at one point that you believed the signs were approved by the Secretary of State?

Judge FITZWATER. Yes, Senator.

Senator METZENBAUM. How did you come to that conclusion?

Judge FITZWATER. Well, David Dean, who was mentioned in the Pat Guillot letter, was the Texas Secretary of State at the time.

Senator METZENBAUM. And I guess all he says is they have been cleared; "we cleared this with them." Did that mean to you that they had said it was legal?

Judge FITZWATER. Well, this is not the only thing that I was relying on, Senator. Justice Guillot also told me over the telephone the night before that it had been approved by the Texas Secretary of State. I was relying on his oral representation as well as this writing.

The word "cleared," as used in the writing, meant to me that it had been approved.

Senator METZENBAUM. But the facts are that there was no formal approval and the Secretary of State said he did not give specific approval, and he was quoted in a Dallas newspaper as saying, "I told the judge"—that is, Guillot—"in a general sense there is nothing wrong with the posters if they properly reflect the law, but that he should run it by the local election officials. It should be done at their pleasure. It is a decision that needs to be made locally by the election officials."

It was not approved by the local election officials, was it?

Judge FITZWATER. I do not believe it was. I have no personal knowledge of that.

Senator METZENBAUM. Was there a sign posted at the polling place in your own precinct?

Judge FITZWATER. No, not that I know of at the time I voted.

Senator METZENBAUM. Did you draw any conclusions from that? Did it start to make you wonder?

Judge FITZWATER. No.

Senator METZENBAUM. Did you think, maybe I ought to go out and get a sign and post it in my own precinct; if it is good enough for them, it is good enough for us?

Judge FITZWATER. Well, I understood that someone would post in my precinct.

Senator METZENBAUM. What time did you vote that day?

Judge FITZWATER. I do not know the exact time. I believe it was first thing in the morning, but I cannot state that under oath.

Senator METZENBAUM. There was an article, I think, in a Dallas newspaper in November 1981 referring to an effort in New Jersey that may have intimidated minority voters from going to the polls. At that time, you were active in party politics.

Prior to posting the signs, had you seen that article or heard of any effort to post voter fraud signs that may have intimidated minority voters in some other States?

Judge FITZWATER. I had not.

Senator METZENBAUM. What did the other judges do in your area?

Judge FITZWATER. With respect to the signs?

Senator METZENBAUM. Posting of the signs.

Judge FITZWATER. As I understand it, Judge Enoch, my colleague, made other arrangements and other persons posted signs both in black and white precincts, but I am not testifying based on personal knowledge.

I understand from the newspaper that Judge Jack Hampton also posted signs. I understand from the newspaper that two or three other judges did not post signs.

Senator METZENBAUM. The same newspaper said that Judge Loving said he concluded the sign was in poor taste. Judge Kinkeade said, "I just assumed it was another campaign thing." McDowell advised—there is a Judge McDowell?

Judge FITZWATER. There is.

Senator METZENBAUM. He advised that at the close of business that day, he placed the posters and the precinct list in the trunk of his car and did not do anything about the posters that night. The next day, which was election day, November 2, 1982, McDowell began to have second thoughts about getting involved in putting up these warning signs. He felt it was something a judge should not be doing. He did not post the signs as requested by Judge Guillot.

I guess that is the sum and substance of it, that McDowell and Kinkeade and Loving had a sensitivity. They are not up for confirmation to be a U.S. district court judge; you are.

I confess that if you have this kind of judgment in connection with the posting of signs warning people of that most precious right to vote and telling them that they may be imprisoned, and probably misleading them as to their rights, frightening them, then I wonder what kind of sensitivity you would bring to issues that would affect minorities and others as well, the poor, when they appear before you in your courtroom.

At the very minimum, I would have to say that your action and conduct in this instance is disappointing. Your judgment is something worse than that.

I appreciate your appearing before us. Thank you very much.

Judge FITZWATER. Thank you, Senator.

Senator METZENBAUM. And thank you, Senator Gramm.

We have four witnesses here, one of whom is the distinguished Congressperson from Texas, Congressman Mickey Leland.

Joe, will you take over?

Senator BIDEN [presiding]. Congressman, welcome. Thanks for coming over from the other body; I appreciate it. We are anxious to hear you. Congressman, would you mind, in the practice of the committee, being sworn in?

Since I am new at doing this myself, do you swear that the testimony you are about to give is the whole truth and nothing but the truth, so help you God?

Mr. LELAND. I do.

Senator BIDEN. Thanks.

STATEMENT OF HON. MICKEY LELAND, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND CHAIRMAN, CONGRESSIONAL BLACK CAUCUS, WASHINGTON, DC

Mr. LELAND. Thank you very much. Let me first inform the junior Senator from Texas that people in my district, and I presume people all over the State, do indeed read signs when they go to the polls to vote to be instructed as to what it is that they are to do or not to do.

Mr. Chairman and members of the committee, it is an honor for me to appear again before you on behalf of my colleagues in the Congressional Black Caucus. It is particularly important to me today, for I come here first as a Texas representative, one who has devoted a career to fighting for the rights of voters in my State and throughout this Nation.

It is because of my absolute commitment to the necessity of integrity within our judicial system, it is because of my personal belief that those who would judge our own integrity should themselves be above reproach, that I come before you to oppose the nomination of Sidney Fitzwater.

There will be those who suggest that the record of this nominee has but one blemish. It is my contention, however, that this mark serves to impugn the record in its entirety.

I would like to state my case very simply. As both a Member of Congress and for 4 years in my capacity as Chairman of the 60-member Black Caucus of the Democratic National Committee, we were forced to battle one of the most onerous and racially-prejudiced strategies of voter intimidation—the Republican National Committee-sponsored ballot security activities.

Senators, let me say to you the courts and legal communities throughout America have established these activities as blatant infractions of the Voting Rights Act. There are active cease and desist orders in numerous jurisdictions across the country where the State Republican Party structure has been enjoined from engaging in ballot security projects.

These activities have included sign posting in targeted black and minority communities both at voting places and in residential areas; the use of uniformed off-duty law enforcement personnel to cruise black and Hispanic neighborhoods with bull horns and read texts of statements designed to generate fear among minority voters.

Ballot security-paid staff have approached elderly minority voters to ask them to show voting cards when no such documents were required. These same staff people have been charged by neutral, non-partisan observers with carrying official-looking papers suggesting authorization to question prospective voters about specifics concerning their place and length of residence in certain locations.

Members of this committee, I want to help establish as clearly as I possibly can the cumulative effect of the sign postings which, in many instances, bear the printing notice and authorization of the National Ballot Security Task Force.

They have been certified as creating a chilling effect in communities where there are not individuals present to explain the law.

This practice was born of racist motivations and has been selectively executed in places of high-density black and minority voter registration.

I am not here to argue partisan politics. Mr. Fitzwater is not guilty of hanging several signs whose impact was questionable. I charge him and assert to you that it is a conscious conspiracy of those who want to curtail the voting activity of black people in this country to support and participate in these ballot security activities.

I charge, and Judiciary Committee staff has seen evidence, that agents of the Republican National Committee ballot security task force teach techniques, strategies and sign-making content as a part of candidate training and youth development programs.

It is my belief that the nomination of an individual, though claiming unwitting participation in this program, is an affront to justice and the basic premise of our constitutional right to vote.

No matter what side of the aisle you sit, no matter the strength of your partisan loyalty, justice knows no party affiliation. I appeal to your sense of propriety and understanding of the message that your action on this nomination will convey.

We cannot ignore this personal indictment. We must not say to those who believe in the democratic process that our Bill of Rights applies only to certain Americans. I do not believe that you, in good faith, can elevate, if not reward, a man who will excuse away his failure to understand the import of choosing to post a sign in a black community, yet elects to skip his home precinct.

I am not ready to accept the task of endorsing those whose responsibility it is to disburse justice when they cannot recognize injustice.

Members of this committee, as a U.S. Representative from the State of Texas and Chairman of the Congressional Black Caucus, on behalf of my colleagues we ask that you oppose this nomination.

I brought with me, and I would like to enter it as an official part of the record, if I may, a letter from the Chairman of the Legislative Black Caucus of Texas, Mr. Paul Hagsdale. He issues this statement in opposition to the confirmation of Mr. Fitzwater to this high judicial post.

I would just like to say, too, that I have been a party to trying to correct some of these problems in my State, and particularly in the city of Houston. If you could have seen some of the kinds of tactics that we have experienced there and if you could have heard some of the responses from the little, old black people, senior citizens, who did feel rather intimidated and who were actually afraid to go to the polls to vote, I think that your empathy would be manifested through your vote in opposition of this nominee.

I thank you, Mr. Chairman.

Senator BIDEN. Thank you, Congressman. If you have time, I would like to ask you a few questions, if I may. Could you supply to the committee or have someone supply to the committee the evidence supporting the ballot security task force training that you mentioned, the training process that is going on?

Mr. LELAND. I cannot at this time, but I will be glad to.

Senator BIDEN. It would be helpful not only for this, but in the future.

Mr. LELAND. Absolutely.

Senator BIDEN. Also, I find myself in a little bit of a quandary here about the nominee. He swears under oath that he was not aware of this being anything other than countywide, black and white precincts, and further that he was not aware of any national effort in this area, and lastly that he is sensitive to and is aware that under certain circumstances there can be a cumulative and chilling effect of posting bills or taking actions which are technically within the letter of the law.

Yet, I am persuaded by your overall assertion that—at least I know where I come from there have been in the past numerous efforts to find ways in which to curtail participation, for one of two reasons, either just flat-out prejudice or a deep-seated belief that black folks are all bought; one of the two.

I have been trying to determine whether I can find anything other than general bad judgment, a causal connection between the practices that have occurred other places and the knowledge of this nominee or a reasonable belief that he should have understood that this, in fact, was the objective of the program.

I guess, like all tough decisions, ultimately you have got to go with your instinct, but can you supply the committee with any evidence of the fact or reason to believe he should have known of the things that you have recited?

Mr. LELAND. Mr. Chairman, I think that the people who will follow me in testimony against this man and his desire to be on the Federal bench will substantiate my allegations. As best as I can, I will try to accumulate as much evidence as I can to present to this committee.

I would suggest to you that it is very difficult for me to find that a man of this man's stature in his community—I find it very difficult to believe that he was ignorant of what was going on in the State of Texas when we felt the impact all over the State of Texas.

Senator BIDEN. At this same time in your home county and city of Houston, had you brought actions in Houston or was it in the paper? Were there allegations in the same time frame?

Mr. LELAND. After we learned what the so-called security force was going to do we called a press conference with various members of the black community and other elected officials who were in Harris County, which is the home county of Houston, to inform people that they should not be intimidated by the tactics being used by the Republican committee in Harris County.

We also placed people at different polling places on election day to inform the voters that they should not feel intimidated by the security task force and their instruments, so that we could maximize the voter participation.

We went on the defensive to try to do as much as we could to curtail the activities of these people.

Senator BIDEN. Well, I thank you very much for taking the time, and I know it does take time.

Mr. LELAND. Mr. Chairman, I would just like to say that, you know, it is ironic that we have just celebrated Dr. Martin Luther King's birthday on the 20th of January, and all that he represented was the facilitation of all American citizens to be truly American citizens, first-class American citizens.

Many of our folks in the struggle for equality and justice in this country died and suffered going to jail and all kinds of inhumanities. One of the best rights that we have to offer in this country is the free ability for a citizen to go to the polls when eligible to vote.

In my community—and my community happens now to be on a national scale in the black community throughout this country—we have done all that we could to inspire voter participation.

When we find that people are trying to place obstacles in that road to participation, it seems to me that that is un-American.

Senator BIDEN. I agree with you about the obstacles. For the record, how do you answer the assertions made by Senator Gramm and others that they cannot understand how anybody could be upset about a sign stating the law?

This is just for the record. You do not obviously believe anyone should offer, accept or agree to accept anything for the vote, do you?

Mr. LELAND. No.

Senator BIDEN. Or that inside the voting place the registrar or anyone else should try to influence how you vote?

Mr. LELAND. No.

Senator BIDEN. Or that if you vote without being registered, that is wrong and illegal?

Mr. LELAND. Yes.

Senator BIDEN. Or that if you let a person vote more than once, that is not the way it works or should work. If you vote someone else's registration, that is wrong. If you violate the Texas Election Code, you should be punished for the violation.

You do not disagree with that, do you?

Mr. LELAND. No, I do not, Mr. Chairman. What is really funny, though, is that the very things that should not go on in the voting place are printed in smaller print than the penalties for the violation.

It is obvious that people will read more readily that they can be imprisoned, which has the force of scaring the hell out of people in my district. Obviously, the junior Senator of Texas has not touched base with those people in the community who might be intimidated by something like that.

Senator BIDEN. See, what a lot of white folks forget is that the white community is accustomed to looking at the police as protectors. At least where I come from, for the longest time the authorities did not protect black persons' rights.

So I just think it is important for the record that we make clear to folks that we are not for any of these things that are listed in the sign.

Mr. LELAND. It is insulting to the integrity and the intelligence of my people, too, Mr. Chairman, for anybody to believe that my folks are going to go en masse to anybody's polling place to commit any one of those violations.

The other thing is that the people who would be afraid the most is not the young people in the black community. As a matter of fact, they would be the people to react, hopefully constructively, but react to that in a very positive way by taking affirmative action against the Republican committee that created this monster.

The other thing is the people who would be intimidated the most are the older people who had been intimidated in their lifetimes when white people disallowed their participation at the polling place or disallowed them to vote for whomever it is that they felt was necessary through various and sundry schemes.

This only represents a return of that kind of intimidation and it scares those senior citizens in our community. Some are not as well educated as others. You know, they are frightened a lot easier than others.

But the one thing that they value and is very dearest to them, and particularly black senior citizens, is that right to vote. Because it took them so long to get it and they hold it as a very precious facility in our country.

But when these kinds of things happen and they are too afraid to participate, they become very, very upset and it hurts them very deeply.

Senator BIDEN. One of the things that did occur—in that 1982 election, it was more than just a local election around Texas, at least as we read it outside of Texas. It was the Clements/Mark White campaign, and I know that the Democratic Party and the senior Senator from Texas and you and others had a massive effort underway to get people registered to vote.

Mr. LELAND. Absolutely.

Senator BIDEN. I just think it is very important, no matter what the outcome of Mr. Fitzwater's nominating process here is, that people understand that sometimes "posting the law" can be an intimidating process for people who used to have the law used against them and not for them.

That is why I held you longer to make the case because I do not want anybody walking out of this room or looking at this on television—not that the nominee suggested this in his testimony, but I do not want anybody walking out of here thinking that you or I or anybody else who has great concern about this supports what the sign represents as being prohibited by law.

Mr. LELAND. Mr. Chairman, I tell you, you know, it would be very difficult for me to sit here today had the Republican Party been consistent throughout the precincts of our State, had they used the same instruments in white precincts that they used in black precincts, but they did not and it was obviously a matter of a racist action against black people. That is what upsets us.

Here again, we are in 1986 and we are discussing matters that are decades old, and that is what is upsetting to my colleagues in the Congressional Black Caucus and myself.

Senator BIDEN. Thanks for your time, Mickey.

Mr. LELAND. Thank you, Mr. Chairman.

Senator BIDEN. We appreciate your taking the time to come over.

Mr. LELAND. Thank you very much.

Mr. SHORT. Mr. Robert Greenberg.

Senator BIDEN. Welcome.

Mr. GREENBERG. Thank you, Senator.

Senator BIDEN. Do you swear that the testimony you are about to give is the whole truth and nothing but the truth, so help you God?

Mr. GREENBERG. I do, Senator.

STATEMENT OF ROBERT M. GREENBERG, FORMER DEMOCRATIC PARTY CHAIRMAN, DALLAS COUNTY, TX

Mr. GREENBERG. Mr. Chairman, it is time somebody comes before this committee and sets the record straight.

Senator BIDEN. I am delighted you are here.

Mr. GREENBERG. I have great respect for Mickey Leland; I have supported Mickey Leland for many years. I was the elected Democratic county chairman in Dallas County in 1982. That is not an appointed post; it is elected.

Senator BIDEN. Are you now?

Mr. GREENBERG. No, I am not. I chose to give up that post in February 1984, voluntarily.

Senator BIDEN. Are you still a registered Democrat?

Mr. GREENBERG. We do not register in Texas; your affiliation is by primary vote. I fully intend to vote in the Democratic primary. I am a partisan Democrat. You will not find my name on Senator Gramm's appointment list or any other list except his enemy list.

If there are two things I can agree with Senator Gramm on, it was to submit the nomination of Robert Maloney to be a U.S. district judge for the northern district of Texas and to submit the name of Sid Fitzwater to be a U.S. District Judge for the Northern District of Texas.

Senator, I do not want to take much time, but I think based on the questions that the committee asked, the committee needs to understand what was going on in Dallas County in August and September and November of 1982.

This was a wild time. I was Jewish and elected as chairman of a party that was fixing to be the minority party in the second largest county in Texas, and there were nine Democratic judges who were running for reelection. And the Republicans had coerced and attempted to get these nine Democrats to change party affiliation—another one of my criticisms of Senator Gramm.

But these judges did not, and the task befell on those of us in the party to try to elect these judges. The Republicans, because these judges did not switch, engaged in a vicious campaign to defeat them, to show them a lesson that Democrats should now be Republicans if they want to be accepted.

I had the support of the Progressive Voters League, one of the largest black organizations in our county; the Coalition of Black Democrats, whom I had just spoken before shortly before this election.

The election administrator of this election was a lady at that time named Connie Drake, whose appointment I personally opposed, who I thought was handpicked by the Republicans. One of the Senators read from the William Bradford Reynolds letter. That letter was as the result of a complaint that I made to the Attorney General of the United States because of this activity in posting these signs.

But the atmosphere in Dallas, TX, in August and September was a wild partisan, political effort, and both parties were utilizing all the strengths that they had. I received a call in the Democratic Party office 2 days before the sign incident and was alerted that

one of our court of appeals judges, who incidentally is also elected, was going to spearhead an effort to put up signs.

The minute I found this out, we contacted two of Texas finest congressmen as far as I am concerned, Congressman John Bryant and Congressman Martin Frost, and we alerted precincts to be on the lookout for this, and if somebody came to post a sign, to tear it down because they did not have any right to post any signs.

Senator, let me advise you that the Texas Legislature in 1983 solved the hiatus in the election code, and now the posting of that sign would be illegal. So the letter that was read by the chairman of the committee from the district attorney's office alleging that they could not find any illegality, I think, was probably true in 1982, but would not be true today.

I think this addresses your concern, Senator. It addresses the concern of the Black Caucus; it addresses the concern of minorities that we should not do anything to intimidate the right of anyone to cast a vote in any election for anybody.

To sit here and hear a Congressman of the United States say that Sid Fitzwater was a part of a national Republican conspiracy is to sit here and listen to something that can never be proven and I believe is grossly inaccurate.

Judge Fitzwater was appointed as a district judge in Dallas, TX, by the then first Republican Governor in a number of years, Bill Clements. And I think the comment in the legal community—and I might tell you, Senator, that I am an active trial lawyer in Dallas, TX, and have tried cases in Judge Fitzwater's court, and try approximately 25 to 30 jury trials a year. So I believe I have some judgmental background to look at judges.

Judge Fitzwater was extremely young and many of us in the trial bar were concerned because of his lack of experience as a lawyer and certainly as a judge. He came to the bench and conducted himself with great reverence to the law. He conducted himself to the extent that he would work late into the night to attempt to understand a legal principle that perhaps he had never confronted as a young lawyer.

I have seen him in situations in trials with experienced lawyers of 150 years combined experience, and Judge Fitzwater had 1 year and he handled the trial of the case with finesse, with judgment, with ability.

Now, when Guillot called Fitzwater and——

Senator BIDEN. How do you pronounce that name?

Mr. GREENBERG. Guillot.

Let me give you some background, Senator. Guillot is a member of a very prominent Republican family in Dallas. He was first on a domestic relations bench and then he went to the court of appeals, also by appointment.

I believe you indicated, Senator, in your State you had appointed judges, and you do know in Texas we have elected judges and they are part of a partisan election process. We do not nominate them on a nonpartisan basis; they run as Republicans or they run as Democrats.

Judge Guillot was an extremely active Republican activist, although he was a member of the judiciary—a first-term judge like Sid Fitzwater who was at the courthouse doing his job; filed for re-

election, gets a call from a senior judge who says, I have talked to David Dean and to Sheriff Byrd and got their OK and approval and we are going to post these signs all over the county.

I must agree with Congressman Leland. If those signs had been posted uniformly all over Dallas County, certainly the effect of voter intimidation would not be as obvious. Understand, Senator, I agree with Mickey's position; I agree with what I deem to be the Democratic side of this committee's position that under no circumstances should you post any sign at any polling place that would discourage someone from voting.

Senator BIDEN. Let me illustrate one of the concerns that some of us have. For example, in the Dallas Times Herald at the time—he sounds like a very enlightened man—"State District Judge Jack Hampton acknowledged Wednesday that he helped post voter fraud warning signs on election day as part of what he believed an effort directed by Republicans"—here is the operative paragraph: "Asked if he considers the signs intimidating, Hampton, a Republican, said, 'We have more black defendants in the courthouse than white defendants. If they steal more, I guess they could be intimidated more.' " That is the comment. That is not the kind of racist attitude I like, you know.

Mr GREENBERG. I would not be surprised if Jack Hampton would make such a statement.

Senator BIDEN. If it is accurate.

Mr. GREENBERG. I would be shocked if Sid Fitzwater would make such a statement. I would be absolutely shocked out of my mind if Sid Fitzwater would have had anything to do with posting any signs if he believed or had any evidence to believe that this was not going to be countywide and that in any way this was designed to intimidate voters. He is not that type of person.

Senator, if you can understand the partisan politics that goes on in Dallas County, I did not vote for Sid Fitzwater and I did not support Sid Fitzwater and I would not come from Dallas to Washington, DC, at anyone's request if I did not sincerely believe that Sid Fitzwater is getting a bum rap.

Senator BIDEN. Why is Sid Fitzwater getting such a bump rap, if you would just outline for us the situation? It was an extremely partisan election when obviously you had great minds like this Judge Jack Hampton, whom I hope I never have to appear before after what I have said about him, assuming the newspaper article is accurate—this was a partisan election and he was standing for election.

Give me some reason to believe why he would not have been sucked in by all this and be a part of it. I mean, you paint this picture accurately of what was obviously an attempt, in your view at least, to have some impact on voters participating.

Mr. GREENBERG. I absolutely thought that is what they were doing.

Senator BIDEN. OK. Now, having said that, we have the other set of facts. You have a young Republican judge who, like young Democratic Senators, is ambitious and seeking reelection.

Why is it that he, given all these circumstances out here, was not doing it for the same reasons those partisan folks who were trying to intimidate were doing it?

Mr. GREENBERG. Because while I, as chairman of the Democratic Party, was traveling all over the county every day finding out what was going on, Sid Fitzwater was holding court.

Sid Fitzwater, although a partisan Republican in his election bid when he ran for election—Sid Fitzwater did not conduct himself in a political manner like Judge Guillot conducts himself or Jack Hampton conducted himself. They are two different breeds of people.

And I do not think it is reasonable to conclude that just because Judge Fitzwater was a Republican judge in Dallas that he was knowledgeable about what the Clements committee and the secretary of state had worked out with this extremely political judge in Dallas who had years of experience in the Republican Party. That is why I say Sid Fitzwater is getting a bump rap.

Senator BIDEN. I understand your rationale, but you could also understand our concern.

Mr. GREENBERG. No question.

Senator BIDEN. Now, let me ask you another question.

Mr. GREENBERG. Certainly, sir.

Senator BIDEN. You had indicated, and I cannot find the exact quote here, that the judges who participated in the posting of the signs were bigots.

Mr. GREENBERG. I said that?

Senator BIDEN. Yes.

Mr. GREENBERG. Oh, I am sure I did. I said lots of things in the paper to do anything I could to bring attention on the fact that the Republicans were playing dirty ball, and I still think they were.

Senator BIDEN. On Friday, November 12, 1982, the Dallas Morning News, page 23A, Greenberg said that the judges who posted the signs are bigots. "To me, it is the worst scandal we ever had in the courthouse," he said, adding that he plans to travel to Austin in the near future to address the Commission on Judicial Conduct. "This is absolutely abhorrent to our system," he said; "I want to make sure they (the judges) are punished or impeachment proceedings are taken before the House of Representatives," Greenberg said.

Mr. GREENBERG. Absolutely, I made that statement, and stand behind it. But I made that statement with regard to the judges who knew what was going on, and I do not believe in mind—I do not believe there is any evidence of it; I do not believe, knowing the man, that Sid Fitzwater fits that description because I do not believe he was party to the grand Republican plan that Mickey Leland described and I really believe was happening.

Senator BIDEN. Well, I admit I was impressed and am impressed by Mr. Fitzwater's demeanor and testimony. I mean, you know, for example, as I understand it, in 1981 and 1982 Mr. Fitzwater was a member of the Republican County Committee in Dallas. What is that? Is that a real committee?

Mr. GREENBERG. You are going to have to ask him. They will not let me into those meetings. I do not know.

Senator BIDEN. Actually, I should have asked him, and I will.

Mr. GREENBERG. Their executive committee—the way it works is the precinct chairmen make up the executive committee, and I do not know whether that is the reference or not. But I would doubt

he was a member of the executive committee because holding a public office, he could not also be a precinct chairman.

Senator, I would like to conclude my remarks and then answer any questions that you might have by saying this: In 25 years of the practice of law and in 35 years of being an active, partisan Democrat, my purpose in coming to this committee is to be an active, partisan American.

And I believe that America will be served by Sid Fitzwater being a member of the Federal judiciary because there is no question of his ability, integrity, honesty, and sensitivity.

Thank you very much, Mr. Chairman.

Senator BIDEN. Thank you. I have no further questions.

Mr. GREENBERG. Thank you.

Mr. SHORT. Andrew Hernandez and Althea Simmons, please.

Senator BIDEN. Would you both please be sworn? Do you swear that the testimony you are about to give is the whole truth and nothing but the truth, so help you God?

Mr. HERNANDEZ. I do.

Ms. SIMMONS. I do.

Senator BIDEN. Welcome. Why do you not proceed in the order you were called?

STATEMENT OF A PANEL CONSISTING OF: ANDREW HERNANDEZ, DEPUTY DIRECTOR, SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT, SAN ANTONIO, TX; AND ALTHEA T.L. SIMMONS, DIRECTOR, WASHINGTON BUREAU, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, WASHINGTON, DC

Mr. HERNANDEZ. Mr. Chairman, thank you for allowing us to share our concerns with this committee. My name is Andrew Hernandez. I am deputy director of the Southwest Voter Registration Education Project based in San Antonio, TX.

We are a nonprofit, nonpartisan organization committed to raising the level of minority participation, particularly in the southwestern States. Over the last 10 years in over 800 voter registration education campaigns that we have undertaken in the States of California, Texas, New Mexico, Arizona, Colorado, as well as other States, we think we have learned some things about why people register and why people vote.

One of the things we learned early on, one of the things that we discovered very early on in our work is that people did not vote because they were prevented and discouraged from doing so.

There was an induced apathy within the Hispanic community. This induced apathy was brought about by an array of discriminatory election devices. It was an apathy brought about by gerrymandering and vote fraud that rendered our vote meaningless.

We have heard a lot about voter fraud at these hearings. In all our experience, Hispanics and minorities have been more the victims of voter fraud and vote stealing in their elections than have been the ones that have perpetuated this on others.

This induced apathy in our community was also induced by outright tactics of intimidation and harassment. Now, I think at one

level we are talking about this as an idea, as history, but I lived through some of that history and I am not that old.

In 1974 when I first started working with the project when it first initiated its work, I recall very distinctly the cases where people were told they would lose their job if they voted or registered. I recall very distinctly the times when sheriffs and deputies were put at polling places, when where you had to register to vote was in the sheriff's office.

I remember very distinctly, in an election contest that we brought to court, opening up voting boxes and finding all the Mexican American votes bundled with rubber bands in boxes that were supposed to be locked.

So voter fraud, intimidation and harassment are a large part of our history. It is well documented; you have some of that documentation available to you in the Voting Rights Act hearings that went on. We can provide that to you. I am not going to get into that.

The point is that there has been a long and rather recent history of voter intimidation and harassment, and we have to understand this particular set of activities that Judge Fitzwater participated in and his conduct in light of that long history and that pattern.

Now, you all have worked through what happened. I am not going to work through that again, but I think there are several telling points in Judge Fitzwater's conduct that we need to keep in mind, and these telling points really raise serious questions for us, grave doubts whether Judge Fitzwater can come to the bench with an unbiased and unprejudiced opinion regarding voting rights issues for minorities.

First of all, there is the telling sign that Judge Fitzwater said he knew that this was a partisan activity. Second, the telling sign is upon voting in his home precinct, he knew that there was not a sign posted. He did not feel the same civic compulsion to post a sign in his home precinct as he did in a black minority precinct.

If this were the case that it was simply a young judge innocently, naively using poor judgment to put up voting signs because he had been asked to, believing that he was participating in a civic endeavor to prevent voter fraud, then I think that those two telling signs would not be there.

Third, on the content of the sign itself, you all have worked through that, also, but I think it is important to look at this, and look at it seriously and put yourself in the place of a first-time voter. For the Mexican American community, that is what I want us to think of; not as an elderly voter, but a first-time voter.

You are coming in to vote for the first time; you have been persuaded to vote because you have been told that it is your right, that it is in your interest to do so. You come in to vote for the first time. You know, as has been suggested, Senator, that sometimes law enforcement officers are not considered your friends in your neighborhood.

And you go up and you see a big sign that says you can be imprisoned. Now, I do not know what we think about voters, but I know that most ordinary voters who have never voted before who come out of a history of intimidation and harassment—if you read number two, "If you influence or try to influence a voter how to vote," they are not going to sit there and think, well, that must be

directed to the election judges or that must be directed to someone else. That is not what it says. It says you can be imprisoned if you influence or try to influence someone to vote.

Well, somebody may have just tried to influence someone to vote as they came in outside the 100-foot distance marker. They may have even tried to do that themselves as they were walking down the street and saw a neighbor.

So the voter would be left with the impression—I think anybody with any reasonable judgment on this question would agree with that—the voter would be left with the impression that if they had tried to influence someone to vote that there would be a chance they could be imprisoned.

Now, I think the implicit message is down at the bottom, "Don't Risk It." Now, you may not have broken the law or you may have broken the law, but the point is do not risk it, and do not risk it by voting. That is what the intent of this sign is to the average voter. I cannot see how it could be any other way.

It is not to inform. If it did inform, it misinformed the average voter, that first-time voter. It is not to prevent fraud, unless we are assuming that only certain precincts fraud occurs in.

And it was not part of a large civic program of a nonpartisan nature that included groups like us. We have yet to be asked to participate in any ballot security program. We have some questions about fraud because it is usually done against us and elections are stolen from us, but we have not been asked to participate in that type of program.

All those, I think, are very, very telling signs. However, let us assume for the moment that what Judge Fitzwater has shared with us is correct and let us assume that perhaps he made a poor judgment in doing this and, in retrospect, it would not happen again.

Even if we assume that, you have got to assume at the same time an ignorance of all the long history of intimidation and harassment, a lack of sensitivity to what this could mean to a first-time voter in a minority community who comes out of that history, and a real, real lack of understanding of what it means to have to fight and struggle for a basic right that many other Americans have taken for granted for generations.

Senators, maybe in your communities voting is a positive thing. It is your home, your church and your friends who are electing judges. But in many of our communities, that is not the case. It has not been the case until recently, and under protection of the law and under redress by the courts.

But if you think of an experience where you have had hostile election judges, where people have lost their jobs, where you have had people thrown into court under the flimsiest of evidence, later thrown out, with the only purpose of discrediting their leadership within that community—if you think of that whole set of experiences and then you ask did Judge Fitzwater really feel that, could he know that, should he have known that, I think the answer is yes, he should have known it.

He grew up in Texas; he must have studied history like we all did. He must have realized that. So even at best, his insensitivity to voting rights and the voting rights of minorities is so great that we could not expect a fair, unbiased and reasoned judgment from him

on the Federal bench when these types of cases went before him because the best argument he can have is I thought it would not make any difference; I do not think it would have had an impact.

I think that is what he is saying. In his own words, he, at the time, did not give it a second thought. Well, excuse me, Senator; I am paraphrasing it. At least that is what I understood him to say; he did not give it a second thought, what he was putting up or what it would mean or what the impact of that could be.

That is the best we can give him, insensitivity. But there is another deduction we can make that Judge Fitzwater, an intelligent young man—his credentials have been brought before us—part of a larger political community—he was running as a Republican—part of a team, so to speak, that he was asked to join—his conduct was simply a cynical participation in a partisan effort to scare voters that would not vote for his party.

It is very, very hard for me to understand how can someone with such intelligence and such wisdom when it comes to law cannot understand the linkages between this program and voter intimidation. I just find that not tenable.

If that is the case that he has shown outright hostility to the voting rights of American citizens, then he should not sit as a judge. He should not sit as a Federal judge; he perhaps should not sit as a judge, period, even if elected.

However, we judge Fitzwater's participation in this program and this set of activities, the fact of the matter is that by taking part in this program, he demonstrated quite clearly hostility to voting rights issues—hostility and insensitivity to voting rights issues.

Enforcement by Federal judicial officers is essential to the protection of voting rights guaranteed to all citizens under the law, and we do not believe that Sidney Fitzwater possesses the requisite sensitivity to these issues to qualify him for appointment to the Federal district court.

Let me just say this, Senators: We have a great responsibility to live our commitment to the full and unhindered exercise of a person's right to vote, and there is a public trust that goes along with that. There is a public trust with all those Mexican Americans, hundreds and thousands of them, who are literally voting for the first time and are entering the democratic process for the first time.

And that trust is that they will be able to exercise their vote; that that vote will not be compromised and that right will not be compromised, and they can do it unhindered, without harassment and without disenfranchisement of that basic right.

That is the trust that these new voters bring to us. I do not think that we can betray that trust, and that is why we would urge the Judiciary Committee to deny Judge Fitzwater's confirmation.

Mr. Chairman, I have a series of documents that are not lengthy and they are part of the attachments to my testimony. I request that they be made part of the record.

Senator BIDEN. Without objection.

Mr. HERNANDEZ. Thank you, sir.

[The statement follows:]

TESTIMONY BEFORE THE
SENATE JUDICIARY COMMITTEE
CONCERNING THE NOMINATION OF SIDNEY FITZWATER
BY THE SOUTHWEST VOTER REGISTRATION

Mr. Chairman and Members of the Committee:

Thank you for allowing us to share our concerns with this committee. My name is Andrew Hernandez. I am here as the deputy director of the Southwest Voter Registration Education Project based in San Antonio, Texas. The Southwest Voter Registration Education Project is a 501(c)(3) non-profit, non-partisan organization committed to raising the level of political participation of minorities in the Southwestern states of Arizona, California, Colorado, New Mexico, Texas, and Utah. Since its inception in 1974, the project has conducted more than 800 local voter registration campaigns in more than 200 local communities.

We have also sought to insure that the voting rights of all American citizens are protected against discriminatory election devices and against those tactics that would attempt to harass and intimidate voters from exercising their full voting rights as American citizens. The project has successfully litigated 82 voting rights lawsuits. We have never lost a case.

It is for this reason that SVREP as well as a number of other civil rights organizations are gravely concerned with the prospect of State District Judge Sidney Fitzwater's elevation to the federal bench in the Northern District of Texas. As a State District Judge standing for election in the 1982 General election in Dallas County, Judge Fitzwater participated in posting intimidating warning signs in minority precincts whose clear intent was to discourage voters and confuse them about their right to vote. His conduct raises serious questions about his commitment to the protection of the voting rights of all American citizens and consequently his fair and unbiased judgement regarding his fundamental right.

Judge Fitzwater has admitted he posted several signs in a minority precinct which noted in large red type: "YOU CAN BE IMPRISONED" and listed six actions constituting voter fraud or illegal influence.

The violations listed were vague and misleading. They were obviously not intended to inform the voter. They were in fact misstatements of the law. For example, the signs threatened imprisonment:

"If you influence or try to influence a voter how to vote"

Senators, this is such a broad statement that it is simply inaccurate. If it were accurate, then a large number of elected officials would be in violation of the law and therefore could be imprisoned. If Judge Fitzwater recognized how misleading such a statement could be to a voter, then he must have known the signs were intended to do something other than prevent voter fraud.

Now if Judge Fitzwater, after reading these signs, deemed that these statements were not misstatements of the law, then his knowledge of election laws is sorely suspect. On the other hand, if Judge Fitzwater recognized the inaccuracy of such a statement and proceeded to post them, then his ethical conduct is highly suspect. In either case, Judge Fitzwater's conduct demonstrated either poor judgement of unethical behavior.

It is important to note that neither the Sheriff of Dallas County nor the Secretary of State initiated or gave prior approval to the posting of the signs. It is also important to note that out of 400 precincts in Dallas County, only 80 signs were posted. Ninety percent of the black precincts were posted warning signs compared to 10% of all other precincts. Judge Fitzwater did not feel the same civic compulsion to post these warning signs where he voted even though none had been posted.

There are two deductions we can make about Judge Fitzwater's actions. If we assume that, as he has stated, that he believed the signs to have been approved by the Secretary of State, that he was involved in a civic effort to prevent voting fraud, and that these signs would not have a detrimental effect on minority voting, then we have to assume that Judge Fitzwater is ignorant of the long history of minority voter intimidation and harassment, of the fact that voting fraud has often been perpetrated against minority voters rather than by them, of the fact that the right to vote has been secured in spite of all the devices meant to disenfranchise and discourage minority voters. At best, Judge Fitzwater's conduct demonstrates a serious insensitivity to minority voting rights.

On the other hand, by participating in a program that was clearly designed to intimidate minority voters as a partisan scare tactic, as we believe was the case, Judge Fitzwater demonstrated such a blatant disregard for the rights of citizens that he should not sit as a federal judge.

However we judge Fitzwater's participation in the program, the fact of the matter is that, by taking part in this program, Fitzwater demonstrated hostility to voting rights issues. Enforcement by federal judicial officers is essential to the protection of voting rights guaranteed to all citizens under the law. We do not believe Sidney Fitzwater possesses the requisite judgement and sensitivity to these issues to qualify for appointment to the federal district court. We, therefore, urge the Judiciary Committee to deny his confirmation.

Mr. Chairman, I have a series of documents that are not lengthy and I respectfully request that they be made part of the record.

**Do Not Remove This Sign - By Order
Of The Sheriff Of Dallas County**

YOU CAN BE IMPRISONED:

1. If you offer, accept or agree to offer or accept money or anything else of value to vote or not vote.
2. If you influence or try to influence a voter how to vote.
3. If you vote without being registered.
4. If you let a person vote more than once.
5. If you vote with someone else's registration.
6. Violate Texas Election Code or Texas Penal Code.

DON'T RISK IT OBEY THE LAW

NOV 22 1982

DALLAS TIMES-HERALD

Ron Calhoun / *The sign controversy*

At 6:30 p.m. today, the Dallas County Commissioners Court will attempt to shed more light on the controversies that marred the Nov. 2 general election here. The main point of discussion at the public hearing will be on why certain precincts in the black community were not supplied with enough punch-card ballots to allow every voter a timely opportunity to vote.

But if Sheriff Don Byrd and Court of Appeals Judge Patrick Guillot show up (they have been officially "invited" to testify), the commissioners court also will plumb another question: Why the sheriff allowed his deputies to be used to put up unauthorized signs at polling places at the behest of Judge Guillot.

The signs warned voters not to remove the signs on orders of the sheriff, and declared further that voters "can be imprisoned" if they accept money to vote, try to influence somebody else's vote, vote without being registered or use somebody else's registration certificate. They also warned election judges that they could suffer the same penalty if they let voters vote more than once.

Some folks have asked me why all the hullabaloo. What's wrong, they ask, with posting signs that admonish people to obey the law? The simple answer is that there is nothing wrong with it as long as the signs are within the confines of the law. But a more detailed explanation is required to make the case that Sheriff Byrd and Judge Guillot engaged in questionable, if not illegal, activity.

As far as I know, I am the only journalist in Dallas who has gotten any response on the subject from Judge Guillot. After obtaining the initial details from Sheriff Byrd, who readily answered my questions the day after the election, I called Judge Guillot and asked him if he knew about the signs. He said he did. I asked him what authority he had to ask Sheriff Byrd to have his deputies, working on county

time, to post the signs. He declined to comment. I asked him where the signs came from. He declined to comment. I asked him who paid for the signs. He hung up.

Sheriff Byrd said he allowed the use of his deputies only after Guillot assured him that they would be posted in all precincts and that they were legal.

Subsequent facts uncovered are these: There was no concerted effort to post the signs in predominately white North Dallas County. The signs were paid for by Gov. William P. Clements' campaign committee. According to a note sent by Judge Guillot to other judges who owed their appointments to Clements, the request for posting the signs came from "Governor Clements' ballot security chairman." Guillot also said in the note that he had cleared the signs with Secretary of State David Dean, a Clements appointee and the state's chief election officer. Dean has since said his office did not give permission to post the signs. Sheriff Byrd, a Republican like Guillot, initially said Dist. Atty. Henry Wade indicated that he knew of no law to prohibit posting the signs. Wade gives a different version. He said his office advised Byrd not to post the signs because similar activity in other states had been considered "intimidating" to minority voters.

Now we are at the nub of the situation. Sheriff Byrd said Judge Guillot requested the use of his deputies to post the signs because many of his "volunteer" sign-posters were "afraid" to go into black precincts. As is my habit, I visited several polling places on election day, in my home area in Northeast Dallas and in the black precincts after I got wind that serious ballot-shortage problems were being experienced there. One election judge, Elbert Turner, removed the sign posted at his South Oak Cliff polling place after he determined there was no legal authority to support it. Election judges in two other predominantly black precincts said they didn't question the posting of the signs. They assumed the signs were legal because deputies put them up.

The reason for using judges (some of

Clements' appointees agreed to help post the signs and some refused) and deputies to deliver such signs is clear to me — it gives them an air of officialdom. Who's going to argue with a deputy or a judge? The fallacy in the deputy ploy is that the Republicans had plenty of volunteer poll watchers in each black precinct who could have asked permission of the election judges to put up the signs. Part of them got their marching orders from Dean's office and the rest of them were involved in the Texas Republican party's "ballot accuracy program."

Clements, the state's first Republican governor since Reconstruction, wanted to win re-election and was determined to reduce the potential for vote-stealing or undue vote-influencing in minority precincts. That's understandable. But Guillot, his appointee on the Dallas Court of Appeals, used a questionable tactic to do the governor's bidding.

Guillot is very much a political animal. He is heavily involved in GOP candidate recruitment. Although he was unopposed himself, he had a big stake in the election of other Republican candidates who had opponents. His father, businessman L.E. Guillot, has been a longtime Republican party fundraiser and campaign activist. Thus, it is clear to me that the sign episode, from start to finish, was political — not civic — in nature. The signs were paid for by the Clements campaign but did not carry the Clements disclaimer as required by state law. The intent was to make it look like they were official election signs.

When a politician can convince a sheriff of his party to post the sign of his choice at polling places, then questions must be asked and steps must be taken to see that such activity never occurs again. Even county GOP chairman Fred Meyer strongly condemned it. If there is no specific statute prohibiting such activity, then the Legislature needs to pass one with enough teeth to capture widespread attention.



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DALLAS TIMES-HERALD

Two more judges posted signs linked to Clements' campaign

By JEFF BROWN
Staff Writer

Two more Republican state district judges acknowledged Thursday that they posted vote-fraud signs on Election Day, and three others said they were asked to do so by Patrick Guillot, associate justice of the Court of Appeals in Dallas, but refused.

One of the judges released a copy of a letter that listed the sign postings to the re-election campaign of Republican Gov. William P. Clements Jr.

The signs were posted in polling places and warned voters that "YOU CAN BE IMPRISONED" for vote fraud. Some Democrats and blacks have charged that the signs were part of a Republican effort to intimidate blacks and discourage them from voting.

State District Judges Craig T. Enoch and Sid Fitzwater said they posted the signs at Guillot's request. On Wednesday, state District Judge Jack Hampton said he had posted the signs in three polling places.

Three others, state district judges Kelly Loving, Ed Kinkeade and Pat McDowell, said Guillot asked for their help but they did not post the signs.

Fitzwater said Guillot discussed the signs with him a day or two before the Nov. 2 election. On Monday, Nov. 1, he said, he returned from his courtroom to his office about 5 p.m. and found a stack of the signs on his desk along with a handwritten note on stationery bearing Guillot's letterhead and signed "Pat Guillot."

Fitzwater provided to the Times Herald what he identified as a copy of the note:

"Governor Clement's ballot security chairman requested that all his judicial appointments help out in the effort to keep voting fraud to a minimum. You are requested to post these posters in the polling places early tomorrow. Your precincts have been circled.

"I talked with (Secretary of State) David Dean and Sheriff (Don) Byrd Friday and cleared this with them. Remember, when you discourage voting fraud, you (underlined) gain votes, too."

Guillot could not be reached for

comment.

Fitzwater said he and Enoch posted one of the signs in a polling place in a South Dallas high school the evening before Election Day.

Asked whether he had considered the propriety of posting the signs, he said:

"At the time, I didn't think about it. At the time it was two days before the election ... I had been asked to participate in a program to minimize vote fraud. We as a party had been very concerned about vote fraud since 1980."

Enoch said that in addition to posting the sign with Fitzwater on election eve, he posted the signs in about 10 North Dallas polling places on Election Day.

He said that he, too, received a note from Guillot asking for his help shortly before Election Day, and that he and a classmate of his sister's posted the signs while they were out posting lawn signs for his re-election campaign.

Last week, Byrd said he had been advised by an assistant district attorney not to post the signs and had relayed that to Guillot. Byrd said Guillot later told him that he had received approval from Dean.

Dean said he had told Guillot that such signs should not be posted unless approved by local elections officials. Dallas County Elections Administrator Conny Drake said she was never contacted by Guillot and would not have approved the signs without first getting a go-ahead from Dean's office.

Controversy over the signs began last week when it was learned that Byrd had ordered some of his deputies to post the signs in about 30 South Dallas polling places. Byrd said Guillot and David Moseley, state co-chairman of Gov. William P. Clements Jr.'s ballot security program, an arm of the governor's campaign organization, asked for the sheriff's help because they could not find volunteers to go into black precincts in South Dallas. Byrd said he did not know the signs were linked to Clements' campaign.

Judge McDowell said that late Monday afternoon before Election Day, "I'd gone down to the court of appeals seeing another judges on one of my cases and I ran into him (Guillot) and he said, 'Hey, would you do something for me?'"

McDowell said he went into Guil-

lot's office, where there was a stack of the signs, and Guillot issued him signs and a list of polling places to post them in.

He said he put them in the trunk of his car but forgot about them and never posted any.

Judge Loving said, "On Monday night before the election, I was in a jury trial and I came into my office and there was a stack of signs on my desk and a letter that said post them."

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Senator BIDEN. Ms. Simmons.

Ms. SIMMONS. Thank you so much, Mr. Chairman. I am Althea T.L. Simmons, director of the NAACP's Washington Bureau. We appreciate this opportunity to appear before you today.

Mr. Chairman, I have an institutional memory about Dallas. My first vote was cast in Dallas County, TX. I lived in South Dallas. I did voter registration and voter education to get out the vote in Dallas before the Voting Rights Act was passed.

I know the kind of intimidation that took place in Dallas. I have directed my organization's national voter registration campaigns, and thus have had an opportunity to study the kinds of tactics used by various groups across the country to intimidate and/or discourage black participation in the electoral process.

The kind of thing that happened recently in Dallas was almost a replay of something that happened in 1964 in New Jersey.

I am concerned, Mr. Chairman about Judge Fitzwater's nomination because the action that he admits he participated in was taken less than 6 months after the Congress, by a substantial bipartisan vote, enacted the extension of the Voting Rights Act as the culmination of widely-publicized hearings which brought out many actions being taken to dilute the minority vote. One of the field hearings was held in Texas.

The NAACP believes that a person who stands for a Federal judgeship should be a person who possesses and has a demonstrated commitment to equal justice. It is because we believe in that so strongly that we appear today to urge this committee to deny confirmation to Judge Fitzwater because we do not believe, based on his aforementioned actions in 1982, that he has such demonstrated commitment.

If Judge Fitzwater, as he intimated in his deposition, did not see a connection between the warning signs being placed in minority neighborhoods and denial of the right to vote, he was incredibly naive. Or if he took such actions deliberately, he lacked a commitment to equal justice.

It is our considered opinion that we have not moved too far from the days when I became a registered voter amid barriers that existed to dilute the minority vote.

If you look at that sign and see you are subject to imprisonment, blacks are imprisoned in numbers disproportionate to their percentage in the population. Big, red, block letters would be sufficient to deter a number of persons because there is that innate feeling that law has spoken.

It is our belief that a person who sits on a bench, even though in a partisan election, and takes part in activity which has the potential of denying a citizen the right of franchise lessens the status of his position on a bench, be it a Federal bench or be it a district bench.

And certainly the NAACP think that it actually portends a lack of good judgment. We question his judicial temperament and we are concerned, as this Congress is concerned, about the exercise of the basic right to vote.

Any actions taken that would serve as a deterrent to large numbers of persons who just, in recent years, have gained the opportunity to exercise that right. I must briefly refer to the post-Recon-

struction era. You know, during Reconstruction blacks got the right to vote and in a number of States, blacks were registered in high percentages; in Mississippi, for example, 70 percent of those who were eligible registered.

Then came the Black Codes and the percentage of persons registered to vote went down to 7 percent and stayed that way for almost 80 years. It could happen again. Mr. Chairman I have a personal reason for expressing concern regarding this nomination. I am from Texas—I lived in Dallas County for 20 years—I know the kinds of things that blacks had to suffer that would not be considered as a deterrent to the right to vote by unthinking whites.

The NAACP urges you to give serious consideration to the fitness of Judge Fitzwater to serve as a Federal judge. We base our opinion strictly on the fact that we do not believe that he has good judgment and that he possesses a demonstrated commitment to equal justice.

Thank you for allowing me to testify.

[The statement follows:]

TESTIMONY
OF
ALTHEA T. L. SIMMONS
DIRECTOR, WASHINGTON BUREAU
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Mr. Chairman, and members of the Committee, I am Althea T. L. Simmons Director of the Washington Bureau of the National Association for the Advancement of Colored People. I thank you for this opportunity to appear and present testimony on behalf of our organization.

The NAACP is the nation's oldest and largest civil rights association with more than 2100 branches and youth units in the fifty states and the District of Columbia.

The NAACP has traditionally been concerned about the caliber of person who sits on Federal benches and believes that persons confirmed to be Federal judges should "possess and have demonstrated commitment to equal justice." It is because the NAACP believes strongly that such demonstrated commitment is essential in our judicial system that we appear today in opposition to the confirmation of Judge Sidney Alan Fitzwater. The NAACP believes that Judge Fitzwater, as recent as November, 1982 participated in a so-called Texas Republican Ballot Security Program by posting warning signs in a predominantly black precinct the night before the general election.

These signs threatened imprisonment to voters who violated a list of activities (some of which were later found to be illegal). The signs, with the words "YOU CAN BE IMPRISONED" and "DON'T RISK IT...OBEY THE LAW" printed in boldface type in red also claimed that individuals could be imprisoned:

- o If you offer, accept or agree to offer or accept money or anything else of value to vote or not vote.
- o If you influence or try to influence a voter how to vote.
- o If you vote without being registered
- o If you let a person vote more than once
- o If you vote with someone else's registration
- o Violate Texas Election Code or Texas Penal Code.

The caption at the top of the sign said "Do Not Remove This Sign - By Order Of the sheriff of Dallas County."

We have been informed by our leadership in Dallas, Texas that such signs were placed in approximately 80 of the 400 precincts. The majority of the signs were placed in minority precincts.

Judge Fitzwater stated in a deposition taken in the case of Isaac Jackson and Joyce Washington v. Connie Drake, et al that he posted several signs in South Dallas precincts at the request of Judge Pat Guillot who was using the Sheriff and judicial candidates to post such signs. There is no indication in Judge Fitzwater's response to interrogatories that he questioned the legality or even the advisability of what he was being asked to do. We believe that such conduct clearly shows a lack of judgment. This action was taken less than six (6) months after the Congress, by a substantial bi-partisan vote enacted the extension of the Voting Rights Act as the culmination of widely publicized hearings which brought out many actions being taken to dilute the minority vote. One of the field hearings on the extension of the Act was held in the State of Texas.

The NAACP believes that a vote to confirm Judge Fitzwater would be a vote to refute that bi-partisan action of the Congress and the fundamental principle upon which this democracy is based, i.e., the right to vote.

President Lyndon B. Johnson, in his appeal for passage of the 1965 Voting Rights Act, reminded America that "every device of which human ingenuity is capable has been used to deny [blacks] this right [to vote]." He was referring to the Post-Reconstruction period when black America had this right - the right to vote- taken away, not to be regained in large measure until the 1960's. The President could have just as easily been referring to actions of Mr. Fitzwater.

Mr. Chairman and members of the Committee, the Justice Department, after an investigation of the actions taken by Judge Fitzwater and others in the placement of the signs stated, "we are concerned that no nonracial justification has been offered for placing most of the signs at minority precincts...we have received no information that such [voter] fraud was any more likely to occur at the black voting precincts than at white voting precincts."

We do not know how many voters were deterred from exercising the right to vote by the intimidating warning "YOU CAN BE IMPRISONED".

The NAACP believes that the actions of Judge Fitzwater are inexcusable. If, as he intimates, in his deposition, he did not see a connection between the warning signs being placed in minority neighborhoods and denial of the right to vote, he was incredibly naive or, if he took such actions deliberately, he lacked a commitment to equal justice. It is the NAACP's considered opinion that Judge Fitzwater's demonstrated lack of judgment regarding this

basic right - the right to vote-- goes to the very heart of his fitness to serve impartially on a federal bench. We urge you to vote against his confirmation.

Thank you Mr. Chairman and members of the Committee for this opportunity to present the NAACP's views on this nomination.

Senator BIDEN. Thank you. Ms. Simmons, can you give me any examples of the kinds of things that did happen or could happen that "insensitive whites" would not think of as intimidation, in your last comment you made?

Ms. SIMMONS. Yes. As a matter of fact, I can recall a number of incidents where poor blacks were told that if you go to register and vote, then we are going to be certain that you do not get AFDC; we are going to be certain that you do not get a chance to do various other things. We have had examples of that routinely.

When I did voter registration, one example I can give you that stands clear in my mind—we had gone to a project; 2,000 persons lived in the project, 2,000 families. And we had offered voter registration activities, babysitting services; you know, rides to get registered and everything. And we had a squad of youngsters going out to get the person to commit themselves with sound trucks, the whole works.

And that day we went to get the people to go down to register; only 15 persons showed up, yet they had made commitments. The next day we went back to find out why they did not come out and we found a series of telephone calls had been made, visits had been made telling them, you will be put out of public housing if you go down and register to vote; you will not get a welfare check; your kid will not be able to go to "x" school.

So what we did was to then do an educational campaign, try and take care of some of the problems that surfaced in those statements made to them. Then we took them down to register and vote.

But this is the kind of thing that can occur and that has occurred in the course of our voter registration activities to actually serve as a deterrent to blacks to go down and exercise the right to vote.

Senator BIDEN. Let me ask you both what is a difficult question, I think, anyway. You both essentially have stated the case in the alternative; one of two things exist.

Either the judge was a part of a conspiracy which he was aware of and participated in with the expressed purpose of diminishing the participation of minorities in—

Mr. HERNANDEZ. Could I just change—I did not think I used the language "conspiracy." The intent of the program was to discourage minority voting—I do not know if people sat down and—

Senator BIDEN. But he was aware of—

Mr. HERNANDEZ. Of the impact, yes.

Senator BIDEN. He was aware of the intent to discourage and willingly participated, his intent being to also discourage.

Mr. HERNANDEZ. That is my point, yes.

Senator BIDEN. Or he was merely naive in that he failed to understand the linkage between the chilling effect these words have and the history of Texas.

Mr. HERNANDEZ. That is right; that is correct, sir.

Senator BIDEN. One of those two. Now, I would like to ask you, after hearing him and researching his record, which of those two do you believe was the case?

Mr. HERNANDEZ. Senator, I believe it was the case that Judge Fitzwater knew that this would have a chilling effect. I cannot help but note that the note he got underscored "you gain votes"; I mean, you gain votes. I think that was the implicit code message in the letter.

Nobody is going to put to the pen the reason we are doing this is to discourage black voters from voting, but you can put——

Senator BIDEN. I am not asking you to prove your case. I just wanted to know which you thought.

Mr. HERNANDEZ. I would think, sir, that Judge Fitzwater knew that these type of signs being posted would reduce minority turnout.

Ms. SIMMONS. I do not believe that it was naivete. I believe he knew.

Senator BIDEN. I do not have any further questions—hold on just a second; let me make sure while I have you both. Is there any evidence of reduced participation in any of these precincts, in fact, in 1982; for example, in the one precinct that he did post a sign in?

First of all, is there any question that, in fact, for whatever the reason, he only posted them in one precinct? Does anyone have any evidence of anything to the contrary?

Mr. HERNANDEZ. No, sir, I do not have evidence to the contrary.

Senator BIDEN. And, second, do we have any evidence that there was, in fact, a reduced turnout in that precinct? It does not go to the heart of your case; it is just a matter of fact. I am curious as to whether or not we know.

Ms. SIMMONS. Senator, I have spoken to about 20 different persons in Dallas County, TX, as late as this morning and I have been told by our leaders in the branch there and also by other persons, including academics, that there was reduced vote participation; that signs did appear, for example, in Precinct 3315, the Meta Lee Nash precinct; 3318, the F.E. Diggell precinct; 3319, the Gloria Hope precinct, and that a number of persons said to individuals who were members of our voter registration education committee that they did not vote because they saw the signs.

Senator BIDEN. I am not doubting that, Althea. What I am trying to get at is if there were 2,500 people who voted in the precinct in 1980 and 3,500 people who voted in that same precinct in 1982 with this sign posted, that does not speak to the motivation.

Ms. SIMMONS. Nobody gave me any figures like that.

Senator BIDEN. I am just curious as to whether or not we know those numbers. I was under the impression that 1982 was the largest turnout of minorities throughout Texas in the history of the State of Texas.

I was under the impression that participation increased. And the reason I say this—I know that, to be very blunt about it, that Senator Bentsen and Governor White were very proud of the fact that

they increased minority participation, by almost 1 million votes, if I am not mistaken.

To be very partisan about it, we Democrats have used from that point on Texas as the case in point. We are running around every other State saying look what they were able to do in Texas by voter registration efforts; look what they did; they spent time and money and effort to register people and it paid off.

So I am just wondering what the effect—separate and apart from the judge, it may or may not relate to whether he should be there. I am trying to find out if we know whether or not these signs, which obviously were not just in one minority precinct in Texas but were in minority precincts all over Texas, similar signs, I understand—whether or not it had any effect. That is all; I am just curious.

Ms. SIMMONS. I do not have that information at this time; I will try and get it.

Mr. SHORT. Mr. Chairman, if I might, each precinct was given ballots based on the voter turnout average in the 1978 and the 1980 general elections, and I take this from a document from the Department of Justice from Mr. Samuel J. Reyes, attorney, voting section.

He goes on to say, "Because of their lower turnout in the prior two general elections, predominantly minority precincts were given a proportionately lower number of ballots than nonminority ones," indicating that there was a higher turnout in the 1982 election than in 1980.

Mr. HERNANDEZ. Senator, I have some information on that. You are quite correct. In terms of the total number of registered voters—at least I can speak for the Mexican-American community—there was a significant increase in total number of Mexican-American votes cast in 1982 over 1978 and 1980.

I think we have to put that in context, also. What you had was a significant increase in the number of registered voters, period—a significant increase, and perhaps that is why these types of programs were initiated with such vigor because the voter registration efforts had accomplished what they set out to do, which was to increase the Mexican-American and black registration to record high levels.

For example, from 1976 to 1984, we went from 488,000 registered Mexican-American voters in Texas to over 1 million. So we are talking about significant social change. I see your point, Senator, but the point—

Senator BIDEN. Let us make it clear. I am just asking a factual question.

Mr. HERNANDEZ. Yes, sir, but can I—

Senator BIDEN. Obviously, notwithstanding the fact that there was an increase, the argument could be made it would have increased more in terms of participation.

Mr. HERNANDEZ. Well, my point would be a little bit different than that, Senator. My point would be this: If only one person was deterred, it would be sufficient enough reason in our mind to say that this program was both unethical and does not serve our system of democracy and freedom.

Senator BIDEN. I would really appreciate it at some time—everybody gets led around this place and witnesses are attempted to be led—I would appreciate it at some point if any witness for or against would take me at my word.

I said in the beginning this may or may not at all relate to the judge. I am just asking as a point of fact, a point of information; that is all.

Ms. SIMMONS. I will try and get that information for you.

Senator BIDEN. By the way, I will go a step further.

Mr. HERNANDEZ. OK.

Senator BIDEN. Assuming not a single person was deterred, this is still wrong. I just wanted to know what the facts were in terms of whether or not it had an impact. Again, separate and apart from this hearing on this judge, it would be nice to publish to the world the fact that even though this was underway, we still beat him; not partisanly beat him, but beat him in terms of people showing up.

There are two messages I would like to come out. One is that this kind of practice is wrong, and two is it does not work, and that is the reason I asked the question.

I appreciate your testimony. It is easy enough in Delaware; I do not know how it is in Texas. You can call up, you know, the Department of Elections and you can say, which Reggie will do as soon as this hearing is over, unless he has decided to leave me—call up and pick up the phone and say, hey, what was the total turnout—assuming it was the same district, what was the total turnout in 1980 and what was it in 1982? I am just curious just for my own edification.

I appreciate your time and your effort.

Any more witnesses?

Mr. SHORT. No, but can I just make one statement, Senator? Senator Thurmond is as concerned as anyone about voters being discouraged from voting, as one of the earlier witnesses stated. The Republicans are on this side, as well.

Senator BIDEN. Let me make the case because I think it is inappropriate for even extremely qualified staff to testify from this side of the bench. Let me make the case for the Republicans.

The vast majority of Republicans that I know do not at all share the view that this is a—for example, I think Bill Roth, the Senator from my State, would be out tearing the signs down rather than putting them up. I am confident that Arlen Specter and John Heinz and Senator Thurmond and many others would feel equally strongly.

I am not being solicitous. For example, I think Mac Mathias would probably be out until four in the morning, you know, cutting down the telephone poll if he could not get to the sign.

We have no more witnesses and I thank you two witnesses very much. I would like to ask, if he would like, whether or not, since he is still under oath, Mr. Fitzwater would like to come back today and make any comment or response to the testimony by Mr. Hernandez about the linkage argument.

He argues that it is poor judgment, ignorance of history. There is obviously overwhelming linkage between the kind of activity and the history of the area.

Would you like to comment at all on that?

Judge FITZWATER. Thank you, Senator. I think it is essential that I reiterate the fact that I thought that this particular effort was countywide. That is essential to my explanation of my involvement.

Because I thought it was countywide, I thought it applied equally regardless of the race of a particular precinct. And in my mind, that is the argument that I have for saying that it does not reflect a lack of mature judgment.

Senator BIDEN. I believe your assertion. Why, in 1982, was it necessary countywide to have a sign that looked like that? Was there something that happened in 1980 that made you believe that that was necessary?

Judge FITZWATER. That question is answered partially—I do have a copy of an editorial that I came across in 1984 that refers to 1980, but it reflects what at least the particular newspaper thought was occurring.

If I may read that, it is brief, and then I will respond to the question.

Senator BIDEN. Sure. Would you identify the newspaper, also?

Judge FITZWATER. I will. Thursday, August 2, 1984, the Dallas Morning News, page 14A; this particular article dealt with election judges and the fact that the commissioners had removed six black election judges, and the editorial dealt with whether or not this was appropriate:

Dallas County commissioners should have suspected they would be hit with accusations of racial bias and partisan politics when they dropped six election judge nominees this week. After all, this is an election year and five of the six nominees who were removed from the roll are black.

I think I said six; five of the six.

But the cries of discrimination are neither justified nor appropriate. The commissioners are trying to bring new people to the judge appointments in an area of Dallas that has been plagued for years by election problems.

The voting history in a number of South Dallas and South Oak Cliff precincts certainly supports the desire of the commissioners to make this change.

Following the Presidential election in 1980, numerous complaints about voting irregularities at minority polling places prompted a grand jury investigation. There were charges that some voters had cast ballots absentee and then had voted again on election day. There were other reports that individuals who were not registered had been permitted to vote. And some people were allowed to vote in the wrong precincts.

S.E. Diggells pleaded guilty in 1981 to charges she illegally assisted 22 voters during absentee balloting in the Presidential election. And yet her name was on the list for reappointment as an election judge this year.

Can Dallas County Democrats honestly call it racial discrimination for her nomination to be dropped? For too many years, there has been a disturbingly patronizing attitude toward the conduct of election officials at some minority precincts.

Political veterans have winked and said that the same voting standards cannot be applied citywide. After all, you know that is in south Dallas. That approach is the real racial discrimination. What it says, in effect, is that minority voters in Dallas do not deserve the same opportunity as white voters have for their ballots to be cast and counted fairly.

There is no place for that kind of thinking today. Election laws must be enforced uniformly and the qualifications of election judges should be the highest possible, regardless of race.

By taking the position that judges will not be reappointed if the commissioners do not have confidence in them, county commissioners have issued a warning that they expect a fair and efficiently conducted election in all Dallas County precincts. The public deserves nothing less.

Now, that is a reference to what occurred in 1980. As to the sign itself, is that the kind of sign that is needed? I cannot place myself

in a position and have any basis to justify it by hindsight to say that that was the kind of sign that was needed because I was operating prospectively in the belief that it had been approved.

And there has been testimony today that that does not reflect a mature judgment. But in my mind, there were those three essential ingredients—countywide, approval of the sheriff, and that my participation in a minority precinct was because of a lack of volunteers, not because I was given a precinct and said you choose which one you want to take.

Senator BIDEN. The editorial, for example, points out that there was an impression about south Dallas. I am not that familiar with Dallas. I assume they are basically minority precincts in south Dallas, is that right?

Judge FITZWATER. I assume that is what they mean, yes.

Senator BIDEN. And it seems to me that notwithstanding the fact that you believed it was countywide, you—let me put it this way. The best light I can put on it is that you believed, as it occurs in some parts—I mean, it has not been unknown in white and black precincts in Chicago or Wilmington, DE, for that matter, or Sussex County, DE, that the numbers are not always reflective of the intention of the community when they open up the ballot box or the machine.

The best light I can put on it is that you came along; you were up for reelection. You assumed that the vast majority of folks in that area were going to vote Democrat, at least in that precinct, even though it was countywide.

At best, what hopefully would happen is that fraud that would innure to the benefit of the Democrats would, in fact, be diminished. I mean, did you not talk about that at the Republican committee meetings and the county committee meetings?

Judge FITZWATER. That was discussed not in terms of these signs. It was discussed in terms of pollwatchers and—particularly pollwatchers, yes.

Senator BIDEN. But I mean how would you not make the connection between that kind of concern and this was designed to diminish the concern?

Just put it the best way; forget the last two people who have testified. I mean, I could see, by the way, in a Democratic primary there are places that I am familiar with—so I do not get in real trouble in my State, let me talk about my neighboring State of Pennsylvania, in Philadelphia.

There are places in nonminority communities where, in a primary as a Democrat against another Democrat, I sure would be inclined to have a sign posted. I would be inclined to have, if I could get him to participate, the Lord Almighty to be standing there saying, now, before you walk in—I mean, you know, I do not think anybody in this room is naive enough, including the people who testified, to think that that does not occur.

So I could see somebody thinking in a Democratic primary, in nonminority neighborhoods, in all-white neighborhoods, of the need to remind people that you can go to jail for what you have done in the past and what you might do again. Just forget race; just leave that out for a second.

So I can make the case for you in my mind that you sat there and you said I am up for reelection. I do not imagine you got many votes. Did you run countywide?

Judge FITZWATER. I did.

Senator BIDEN. I do not imagine you got many votes in that precinct, did you, before the first time you ran or the second time you ran?

Judge FITZWATER. Well, 1982 was the first time I was running. I had been appointed before.

Senator BIDEN. OK. Let me put it this way: Historically, did many Republicans win a majority in that district?

Judge FITZWATER. Not that I know of.

Senator BIDEN. I would not think so; I mean, I would be surprised. As a matter of fact, I would get down there and see what was wrong if they did, a little bit like if we won an election in Greenville, DE. You know, I mean I would worry then because nobody in Greenville makes less than x number of dollars and they do not vote. There is only 4 percent registration, in some precincts, Democrat.

So I can see where you might say, look, if this election is going to be stolen from me, I know where it is going to be stolen. It is not going to be stolen from me in a Republican area. Forget race again.

I just cannot understand, though, how you could not make any connection between this sign and the impact it would have in the area you were posting it, or the hoped-for impact. The hoped-for impact, at a minimum, was people would not cheat.

I cannot believe you posted the sign thinking I do not know why I am posting in this district; they never cheat here. I doubt it. You probably thought, did you not, that, yes, there is cheating going on; I hope this stops the cheating?

Judge FITZWATER. Yes, but that is not the point I am trying to make.

Senator BIDEN. I am just trying to understand how you were thinking.

Judge FITZWATER. The point I am trying to make is when you shifted over into the realm of an attempt to intimidate someone, the essential ingredient lacking is my belief which I have testified to under oath that it would be countywide.

I do not say that it did not go through my mind that people who should not be doing these things would not be deterred. But the allegation, as I understand it, is that I was attempting to intimidate legitimate voters from voting, and that was absolutely not my intent.

Senator BIDEN. Let us talk about legitimate voters for a minute. Is a voter who cheated on his income tax a legitimate voter?

Judge FITZWATER. If he has been convicted of a——

Senator BIDEN. He has not been convicted; he just cheated. He knows he has cheated.

Judge FITZWATER. He is a legitimate voter.

Senator BIDEN. See, lots of times people in minority neighborhoods and in white poor neighborhoods—I mean, they found themselves in spots where, like I say, the law had not been with them.

Let me ask you one more time. You did not read these big, red letters and these big, red letters as something that had any rela-

tionship to Texas history? I mean, do you see now how it would have an impact?

Let me put it another way. Do you think that this fellow—I am going to really put you in a spot, but I am in a spot, we are all in a spot; that is what happens when we go for public office.

Do you think this fellow, that great American whom I quoted before, Judge Hampton—assuming that someone said we have more black defendants in the courthouse than white defendants and if they steal more, I guess they could be intimidated more, do you agree with that kind of statement?

Judge FITZWATER. No.

Senator BIDEN. I do not want to malign his character because I do not know him and I do not know whether this is an accurate quote.

Do you understand the connection between why people who think that way would want to do something like this, or do you think this is just totally innocent?

Judge FITZWATER. When you say "want to do something like this," you mean with an intent to——

Senator BIDEN. With the intent; that this was designed to have the intent to intimidate people.

Judge FITZWATER. If you assume that that was the designed intent, I can see a connection.

Senator BIDEN. And you are just telling me that you just did not have that intent, and therefore, a reasonable person not starting off with that kind of bias and intent could see this as a totally legit thing to do?

Judge FITZWATER. If it were represented to him that it had the particular approvals that were represented to me.

Senator BIDEN. I see.

Judge FITZWATER. In other words, distinguished from—you follow me, Senator.

Senator BIDEN. I really do. For the record, I do not believe the first assertion, the first of the two alternatives put forward by the last two witnesses, the calculation, you know, that you were not naive.

But I cannot understand how, being as bright as you are, as educated as you are, a Texan as you are, you could not understand and be sensitive to the impact of this, regardless of whether it was countywide.

I mean, I grew up in an area where I know, even if I had never run for public office, having nothing to do with partisanship, that if you just hang a sign in a black neighborhood that you can be imprisoned, you do not have to put anything else on the sign.

You could be imprisoned for going home and seeing your wife; you could be imprisoned for shooting the minister—I mean, you know, the extremes, from things that you are totally entitled to do to things that are obviously beyond the law. All you have to do is just put this sign in a store window in a black community. Fewer people are going to come in and buy Coke, milk, bread because of where it comes from.

Now, if you did in Scranton, PA, where I am from, where there are only 2 percent blacks—not even 2 percent, probably—you know, it is no big deal. But where I come from, if you did that in

parts of Sussex County, it is like a big, red flashing sign. The man is there; the man is after me. I do not understand how you cannot understand that.

Judge FITZWATER. Well, I did not say I cannot understand that. I was answering——

Senator BIDEN. Or think that, I guess.

Judge FITZWATER. I was answering a question about my thought process during the 24- to 36-hour period involved. I am not saying I cannot understand that.

Senator BIDEN. Did you have any second thoughts after it was over, like, you know, the next day? When you started reading the articles that were printed, did you have any second thoughts the Friday after the election, November 12, when you read articles that I am sure appeared in more than one paper, like the one we read where Mr. Greenberg said it is the worst scandal?

I mean, did you think, gee, I am glad I did not go running around the city putting them up? I mean, what did you think at that time?

Judge FITZWATER. The first time I had any question about it was really when it appeared somewhere in the press—I do not know whether it was print or television—where it appeared that these approvals may not have been obtained.

Senator BIDEN. And what did you think at that time when you saw that?

Judge FITZWATER. Well, I wondered why I had been told they had been obtained.

Senator BIDEN. What do you think about the people who told you it had? What do you think of their character?

Judge FITZWATER. Are you saying generally or with respect——

Senator BIDEN. Specifically. I cannot remember their names, the guy who wrote you the letter saying, you know, this is the thing—do you think that guy is a very honorable guy?

Judge FITZWATER. Well, I do not know because I do not know specifically why he thought they had been cleared. I do not know whether that began with him or whether he thought, in fact, he had the approvals. And I just cannot opine on that.

Senator BIDEN. Did you ever ask him? Did you ever pick up the phone and say, you son-of-a-gun, why did you do that to me or why did you tell me that?

Judge FITZWATER. No, I did not.

Senator BIDEN. Why not?

Judge FITZWATER. Well, in particular, I did not feel that it would be appropriate to talk with him since the lawsuit had followed so shortly after this. He was a co-defendant and I did not feel it would be appropriate to talk with him.

Senator BIDEN. Well, I do not know where I am on this, but I tell you what; whether or not you are confirmed, I would pick up the phone and call the guy and tell him I think he is a chump.

If anybody did that to me and misled me, no matter who he was, I would straighten him up real quick. And if I could not find him on the telephone, I would find his house. The only thing I would worry about is my political career would probably end because I would probably punch him right square in the mouth.

That is one thing, I think, Strom Thurmond and I agree on when, in fact, there are not noble people; we do not fail to resort to force—I would probably punch him right in the mouth for lying to me if I truly believed that, in fact, this had been approved, because I think that is a reprehensible thing he did.

Let us put it another way. You would not be here; you would be gone. You would be sitting on the bench right now were it not for that guy. Right this second, you would be on the bench.

Now, you may be on the bench anyway, but just keep that in mind next time you see him at a cocktail party. [Laughter.]

I mean it. I am being serious; I am not joking. I am being real serious. You would be there now, and if that does not stir a little bit of righteous indignation inside you, then maybe you should not sit on the bench. I do not know. Maybe you should; maybe I am the kind of guy that should not because I do what I would do.

But at any rate, thank you very, very much for coming back.

Judge FITZWATER. Thank you, Senator.

Senator BIDEN. The hearing is adjourned.

[Whereupon, at 5:04 p.m, the committee was adjourned.]

BIOGRAPHIES

DANNY J. BOGGS

NOMINEE, U.S. CIRCUIT JUDGE, SIXTH CIRCUIT

Birth: October 23, 1944, Havana, Cuba.

Legal Residence: Kentucky.

Marital Status: Married to Judith S. Solow Boggs, 3 children.

Education: 1961-1965—Harvard College, A.B. degree. 1965-1968—University of Chicago Law School, J.D. degree.

Bar: 1969—Illinois. 1969—Kentucky.

Experience: 1968—Cravath, Swaine and Moore, Summer Associate. 1968-1969—University of Chicago Law School, Bigelow Fellow and Instructor. 1969-1970—Kentucky Department of Economic Security, Deputy Commissioner. 1970-1971—Administrative Assistant for Education & Legal Counsel to Governor Louie B. Nunn. 1972—Legislative Counsel to the Minority Leader, Kentucky House of Representatives. 1972—Legal Counsel and Chief Researcher, Nixon-Nunn Kentucky Campaign Committee. 1972—Intermittent Consultant to Office of Legal Services, Office of Economic Opportunity. 1972-1973—Sole practitioner, Frankfort, Kentucky [part-time]. 1973—U.S. Department of Commerce, Attorney-Advisor. 1973-1975—U.S. Department of Justice, Solicitor General's Office, Assistant to the Solicitor General. 1975—Sole practitioner, Bowling Green, Kentucky. 1975-1977—Federal Power Commission, Assistant to the Chairman. 1977-1979—Senate Committee on Energy and Natural Resources, Deputy Minority Counsel. 1980-1981—Sole practitioner, Washington, D.C. 1980-1981—Bushnell, Gage, Reizen & Byington, Washington, D.C., Of Counsel. 1981-1982—Office of Policy Development, The White House, Senior Policy Advisor. 1982-1983—Office of Policy Development and Special Assistant to the President, The White House, Assistant Director. 1983-present—U.S. Department of Energy, Deputy Secretary.

WALTER J. GEX III

NOMINEE U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF MISSISSIPPI

Birth: March 20, 1939, Bay St. Louis, Mississippi.

Legal Residence: Mississippi.

Marital Status: Married to Mary Kathleen Lavecchia, 2 children.

Education: 1957-1958—Georgia Tech. 1958-1963—University of Mississippi, B.B.A. degree in 1962, LL.B. degree in 1963.

Bar: 1963—Mississippi.

Experience: 1963-1972—Satterfield, Shell, Williams and Buford; Associate, 1963-1967, Partner, 1967-1972. 1972-present—Gex, Gex & Phillips, Partner.

THOMAS J. McAVOY

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF NEW YORK

Birth: September 17, 1938, Johnson City, New York.

Legal Residence: New York.

Marital Status: Married to Sandra Ann Willis McAvoy, 5 children.

Education: 1956-1960—Villanova University, A.B. degree. 1961-1964—Union University, Albany Law School, J.D. degree.

Bar: 1964—New York.

Experience: 1964-1969—Hinman, Howard & Kattell, Associate. 1969-1984—Kramer, Wales & McAvoy, Partner. 1984-present—McAvoy & Hickey, P.C., Partner.

JUDGE SIDNEY A. FITZWATER

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF TEXAS

Birth: September 22, 1953, Olney, Maryland.

Legal Residence: Texas.

Marital Status: Married to Nancy Jane Ware Fitzwater, 3 children.

Education: 1971-1975—Baylor University, B.A. degree. 1974-1976—Baylor University, School of Law, J.D. degree.

Bar: 1977—Texas.

Experience: 1976-1978—Vinson & Elkins, Associate. 1978-1982—Rain Harrell Emery Young & Doke, Associate. 1982-present—Judge, 298th Judicial District of Texas, Dallas County, Texas.



Legislative Black Caucus

HOUSE OF REPRESENTATIVES
P.O. BOX 2910
AUSTIN, TEXAS 78769
(512) 475-2203

Honorable Strom Thurmond, Chairman
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

February 3, 1986

Dear Senator Thurmond,

The purpose of this letter is to express the opposition of the Legislative Black Caucus of Texas to confirmation of Mr. Sid Fitzwater as a federal district judge. While objections based on Mr. Fitzwater's age and inexperience have merit, our objection is based on concerns which strike at his fitness to determine matters of the significance of those commonly heard by federal judges.

During the 1982 elections Mr. Fitzwater participated in a partisan effort to post unauthorized signs in predominantly minority polling precincts. These signs stated that voting fraud is illegal. The signs were not the official act of any state or local official in their official capacity, much less any official with legal responsibility for conducting elections in Dallas County or Texas. The signs were paid for and posted by a partisan campaign inside a public, official polling place without any attribution of their true source and with the misleading attribution of an official source.

The posting of these signs raises serious questions regarding Mr. Fitzwater's judgment and fitness for service in the federal judiciary for several reasons. In his deposition taken in connection with the suit filed after the incident, Mr. Fitzwater testified he formed no opinion as to the legality of their posting them inside an official polling place prior to posting them. Surely as a state district judge (which we elect in Texas) and as an attorney, Mr. Fitzwater should have been concerned enough for the legality of his actions to make some inquiry into the fact of their legality. Instead, he relied on second hand accounts by telephone that the sheriff and our Secretary of State had told someone else by phone the signs were okay.

In Texas, the sheriff does not conduct elections. Although the Secretary of State is authorized to issue legal opinions, Mr. Fitzwater did not even check to see if a formal opinion had been issued. Both the sheriff and Secretary of State shared Mr. Fitzwater's political affiliation and it should have been clear to him that a potential for conflicting interests existed. The proper course would have been to see that an official opinion existed upon which Mr. Fitzwater could rely. He did not follow that proper course.

It is simply beyond imagination that a judicial officer of Texas would interfere in the conduct of an election over which he had no authority under the laws of Texas. The fact that the material had partisan origins without giving any attribution of its origins

GREGORY WILLIAMS - Administrative Assistant

Rep. PAUL RAGSDALE - Dallas
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Rep. WILHELMINA DELCO - Austin
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Rep. AL EDWARDS - Houston
Rep. SAMUEL W. HUDSON III - Dallas
Rep. JESSE OLIVER - Dallas
Rep. AL PRICE - Baltimore
Rep. LOU NELLE SUTTON - San Antonio
Rep. GARFIELD THOMPSON - Ft. Worth
Sen. CRAIG WASHINGTON - Houston
Rep. RON WILSON - Houston

should have caused him to at least look further into the matter. Perhaps his age and youthful enthusiasm for partisan activities caused him to override his good judgement. Perhaps he would have the same problem in the future.

Given Texas' history of various tactics used to discourage and prevent minority voting, the posting of these signs in minority precincts suggests an insensitivity to minority concerns, at best, and, at worst, an attempt to intimidate minority voters. Why would the Dallas County sheriff be posting "official" signs using partisan funds? Black Texans remember well the use of police officials at polling places to intimidate Black voters. There was no probable cause, nor did Mr. Fitzwater indicate any reason to fear voter fraud at the polls. The whole business suggests an undue prejudice that these voters were somehow susceptible to subversion. Clearly Mr. Fitzwater knew that it was misleading to state, as the signs did, that trying to influence voters was a crime, without stating that this prohibition applies only within 100 feet of the polls.

We are amazed that a Texas judge would take it upon himself to act unofficially to place unofficial and misleading signs at a public polling place over which he had no authority without even seriously considering its legality, the potential for misleading voters as to the law and the apparent source of the signs, or the history of abusive election tactics waged against minority voters in Texas.

These facts do not demonstrate that Mr. Fitzwater holds the prudence, circumspection, and reasoned consideration required of federal judges. We respectfully request that your committee decline to pass his nomination to the full Senate.

The President can easily find other candidates for this vacancy who share his view AND hold the personal qualities demanded of federal judges.

Very truly yours,

Paul B. Ragsdale
Paul B. Ragsdale
Chairman

CONFIRMATION HEARING ON: FRANK J. MAGILL, ROBERT J. BRYAN, MIRIAM G. CEDARBAUM, DAVID R. HANSEN, RONALD R. LA-GUEUX, AND LAWRENCE P. ZATKOFF

WEDNESDAY, FEBRUARY 19, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:02 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Grassley, Simon, Specter, and McConnell.
Staff present: Duke Short, chief investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We are met this afternoon to have hearings on certain Federal judges. The first is Frank J. Magill, of North Dakota. I see the senior Senator from North Dakota here. Senator, have a seat.

STATEMENT OF HON. MARK ANDREWS, A U.S. SENATOR FROM THE STATE OF NORTH DAKOTA

Senator ANDREWS. Thank you, Mr. Chairman. It is a privilege for us to come before this committee.

The CHAIRMAN. Frank J. Magill, I believe, is your nominee.

Senator ANDREWS. Frank J. Magill is my nominee. He is seated to my right, Mr. Chairman.

The CHAIRMAN. You recommended him to the President?

Senator ANDREWS. I recommended him to the President, Mr. Chairman. I recommended him to you. We met in your office some months ago.

The CHAIRMAN. I remember we did, and I did all I could to help you get him. [Laughter.]

Senator ANDREWS. And you did an excellent job, Mr. Chairman.

Let me say that Mr. Magill is recommended not just by myself, but by my Democratic colleague, Senator Burdick. So he has bipartisan support in the State of North Dakota. He is a distinguished trial lawyer.

The CHAIRMAN. Senator Burdick has sent in his blue slip.

Senator ANDREWS. And he is wholeheartedly behind Mr. Magill.

Frank Magill was born and raised in North Dakota, Mr. Chairman. He comes from a farm family. He went off and got educated.

He went to Georgetown Law School and became a very distinguished attorney, and it is our pleasure to recommend him to you, Mr. Chairman, for this seat on the Eighth Circuit that has been traditionally from North Dakota over the years.

I know how busy the committee is, Mr. Chairman, and I do not want to take any more of your time other than to say that we wholeheartedly support Mr. Magill, and I know in your examination of him you will find him to be the outstanding individual that he is, and well qualified for this key position on the bar.

The CHAIRMAN. Thank you very much, Senator. Your high endorsement of him will carry him right through the committee, I am sure.

Senator ANDREWS. With your help, Mr. Chairman.

The CHAIRMAN. Mr. Magill, you are fortunate to have the recommendation here of this able Senator, and we are very pleased to have you before us. I am glad you also have Senator Burdick's approval here, too, and we will try to expedite your process as soon as possible.

Mr. MAGILL. Thank you, Mr. Chairman.

The CHAIRMAN. I see Senator Burdick has just come in.

Senator ANDREWS. I already spoke for you, Quent.

The CHAIRMAN. Senator Burdick, Senator Andrews has already spoken for you, but if you would care to say anything additional, we would be glad to hear from you.

STATEMENT OF HON. QUENTIN BURDICK, A U.S. SENATOR FROM THE STATE OF NORTH DAKOTA

Senator BURDICK. Thank you, Mr. Chairman. I am glad to be back in this hearing room. It is a distinct pleasure for me to introduce your nominee here today. He is a fellow townsman of Fargo, ND. He has been in law practice for a good many years and has distinguished himself.

As a matter of fact, I know he is good because I have tried cases against his firm and I know they are good. So we have a highly qualified candidate here, and without any hesitation at all, I recommend Frank Magill to the Federal bench.

The CHAIRMAN. Well, that is fine. You have got the unanimous endorsement of both Senators spoken out of their own mouths, so it must be true, and we will take it right up and we will try to expedite him.

We thank you very much for your presence, and I hope we can get him on a week from Thursday. Thank you very much.

Senator ANDREWS. Thank you, Mr. Chairman.

Mr. MAGILL. Thank you.

The CHAIRMAN. Let us see; I believe Senator Grassley came in next. Senator, do you have a nominee here? Senator Harkin is here, too, I see. We are glad to have you both.

Senator Grassley, we would be glad to hear from you, and then we will be glad to hear from Senator Harkin.

**STATEMENT OF HON. CHARLES GRASSLEY, A U.S. SENATOR
FROM THE STATE OF IOWA**

Senator GRASSLEY. Mr. Chairman, it is with a great deal of pleasure that I introduce to the committee today Judge David R. Hansen, the nominee for U.S. District Court judge for the Northern District of Iowa.

Mr. Chairman, I have known Dave for a number of years now and I can say without hesitation that he comes before this committee with my highest recommendation and confidence. Dave has proven himself to be a distinguished State jurist, serving as an Iowa district court judge for the past 10 years.

He has demonstrated all the skills necessary to be the administration's nominee to the Federal bench. Dave is a lifelong Iowa resident, with the exception of his pursuance of his education and military service.

He received his B.A. from Northwest Missouri State University and then went on to receive his law degree from George Washington University. Dave pursued a military career as a judge advocate in the Army for a period of 4 years and then returned to Iowa to begin private law practice.

He gained the respect of his peers over the years by his integrity and diligence, which led to his appointment 10 years ago to the Iowa district court bench. Since that time, he has served the people of Iowa well.

His rulings demonstrate a judicial philosophy consistent with my own and this administration's; that being interpretation of the law, not wholesale making of the law.

Mr. Chairman, I am proud to present Judge Hansen to you, to call him my friend, and to urge his rapid confirmation by this committee and by the Senate. The northern district has been without a full-time judge since January and the caseload continues to build and the backlog increases. Therefore, the prompt movement of Judge Hansen's nomination is of crucial importance to my State of Iowa.

I would like to point out, in addition to the statement that I just read, that we have the confirmation process in Iowa where judges run for confirmation every 6 years, and in the general elections of 1978 and 1984, Judge Hansen received the most "yes" votes and the fewest "no" votes of any of the judges on the ballot in that district.

Also, in conjunction with those general election confirmations, we also have a plebescite by the bar, and in both 1978 and 1984 when he was before that plebescite, he received 94 percent "yes" votes by the lawyers, 6 percent "no."

I first met Dave when he handled a case for a group of legislators. We were suing the Governor of Iowa over the item veto, and he carried that case for us and we won on a 7-to-2 decision before the Iowa Supreme Court. It is a classic case of separation of powers that the legislative branch won.

I since have come to respect not only his ability but, of course, his basic philosophy.

The CHAIRMAN. Thank you very much, Senator. We are very pleased to have you come in here in person and speak so highly about this nominee.

Senator Harkin, we would be glad to hear from you.

**STATEMENT OF HON. THOMAS HARKIN, A U.S. SENATOR FROM
THE STATE OF IOWA**

Senator HARKIN. Mr. Chairman, thank you. I want to say that it is a privilege for me to accompany Judge Hansen here today and to join with my colleague, Senator Grassley, in recommending his swift and unanimous approval to be on the U.S. District Court for the Northern District of Iowa.

Like Senator Grassley, I have known Judge Hansen for many years. I first became acquainted with him when he was State court district judge in my home county, Story County, IA. My wife at the time was a prosecuting attorney; she was the county attorney there and tried many cases in front of Judge Hansen, and it was through her that I first met Judge Hansen.

I can tell you that my wife was a very active participant in the county attorneys' association in Iowa at that time, and she has repeatedly told me that Judge Hansen enjoyed the unanimous—and I repeat, unanimous—approval of all of the county attorneys in the district in which he presided for his professionalism, his knowledge, and his application of the law.

As a member of the Iowa bar myself, although not practicing right now, I can tell you honestly that I have never in all of my years in the bar heard one negative comment about Judge David Hansen. In fact, everything that I have ever heard from my fellow lawyers in Iowa has always been said with the highest regard for him personally and for him professionally.

On the personal side, Mr. Chairman, as I said, I have known Judge Hansen, I know his wife, Ginger, and his two children, two boys. And I can tell you, Mr. Chairman, they are really the salt of the earth. The family is close; they are close to each other, they are close to the farm, their church and their community.

I believe the Hansen family reflects very proudly on all of us who have chosen to be public servants. So, Mr. Chairman, I can say with all honesty and sincerity that David Hansen is most suitably equipped by virtue of his intelligence, his temperament, his values and his experience to be U.S. District Court Judge for the Northern District of Iowa.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Judge, I congratulate you upon your appointment by the President, and I congratulate you, too, upon having the endorsement of both of your Senators. One of your Senators, your senior Senator, is a member of this committee. I am sure he will see that you get out of here in a hurry. [Laughter.]

We are very pleased to have you all with us. Thank you very much.

Judge HANSEN. Thank you, Mr. Chairman.

Senator HARKIN. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Grassley, if you want to come around and join the committee, we would be glad to have you.

Now, we have New York and Washington State Senators here. Who came in first? We will take the Senators in the order in which they come in.

Senator MOYNIHAN. I was going to say I think Senator Chafee was here first.

The CHAIRMAN. Was Senator Chafee here ahead of you all?

Senator Chafee, come around. I had not seen Senator Chafee back there.

STATEMENT OF HON. JOHN CHAFEE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. Thank you very much, Mr. Chairman.

The CHAIRMAN. We are very glad to have you with us.

Senator CHAFEE. First, let me say it is my understanding that Senator Pell wished to be here to give his support to Judge Lagueux. That was my understanding, but he is handling a measure on the floor of the Senate now in a foreign relations matter.

Mr. Chairman, it is with distinct honor and great personal pleasure that I introduce to you today Judge Ronald R. Lagueux, who is currently a judge on the Rhode Island Superior Court, which is our highest trial court.

He has been nominated by the President for the newly-created U.S. District Court judgeship for the District of Rhode Island, and that was pursuant to a recommendation that I made to the President.

I have known Judge Lagueux since 1962 when I was fortunate enough to attain his services as counsel to me when I became Governor. He came to this position with excellent credentials.

He attended Lewiston, ME, High School. He graduated cum laude from Bowdoin College in 1955 and received his law degree from Harvard University. Then he came to Providence as an associate with a major firm in the city of Providence until he came to work for me.

As counsel to the Governor, he did an excellent job. As you know from your own vast experience and your own experience as Governor, a person of counsel is a very important position. He reviewed all the legislation to make sure that it was in order, and I must say we never had a problem come up with legislation that I signed and subsequently found there were some difficulties with it.

Ronald Lagueux, as counsel, reviewed that very carefully and I came to have the highest respect for his legal ability and great admiration for his integrity.

In 1964, he ran for the U.S. Senate on the Republican ticket. He did not run against Senator Pell; he ran against Senator Pastore, and that was a very formidable job. It was the same year that Lyndon Johnson received 83 percent of the vote in Rhode Island for President, and Ronnie Lagueux made a fine campaign.

In 1968, I appointed him as associate justice of the superior court, where he served with distinction for 18 years. As a judge, he is known as a man who is stern, but fair, and he brooks no non-

sense in his court. He is a judge before whom good lawyers are anxious to have their cases heard.

Both the bench and the bar in Rhode Island are sorry to see him leave the State court system, but they are delighted that he will remain in our State, if confirmed, and I am confident he will be confirmed as a member of the Federal judiciary.

So I recommend him very highly to you, Mr. Chairman, and to the members of the committee.

The CHAIRMAN. Well, Judge Lagueux, I congratulate you upon your appointment by President Reagan, and I also commend you for having the very high endorsement here of the esteemed, distinguished Senator from Rhode Island, Senator Chafee.

The fact that you have worked with him and made such a fine record and have his high endorsement will certainly carry great weight here. We are very pleased to have you with us.

Senator, thank you very much for your personal appearance.

Senator CHAFEE. Thank you, Mr. Chairman.

Judge LAGUEUX. Thank you, Mr. Chairman.

The CHAIRMAN. Now, I believe New York came in next. We will be glad to hear from you all, if you will come around, Senator D'Amato and Senator Moynihan. We are very pleased to have you.

STATEMENT OF HON. DANIEL MOYNIHAN, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator MOYNIHAN. Mr. Chairman, I have the great pleasure and distinction, in association with my distinguished colleague and friend, Senator D'Amato, to introduce to this committee an attorney from the State of New York, Miriam Cedarbaum, who has been nominated by the President for the position of a district judge in the southern district of New York.

Miriam Cedarbaum has had a career distinguished from the first moment distinctions were being made among persons. She graduated from Barnard College, which is associated with Columbia University, then went to the Columbia University Law School.

Thereupon, she proceeded to clerk in the court to which we are now going to propose that she be appointed, clerking with the Honorable Edward Dimock. She then became an assistant U.S. attorney for the southern district of New York, on which we hope she will serve as justice.

From there, she came to Washington to the Department of Justice itself and worked here for some time. Thereafter, she held a series of eminent positions. One of the more attractive ones was as associate counsel for the Museum of Modern Art. You may not have any idea how litigious artists can be, but she went through that.

She is now a partner in the firm of Davis, Polk & Wardwell. John W. Davis ran for President of the United States in 1924 on the Democratic ticket. It is a very distinguished firm, and she has had a very distinguished practice in that firm.

Ms. Cedarbaum has also been serving as village justice of the village of Scarsdale. So she will bring to the bench the very direct experiences of a small community, with the needs of justice as much present there as in the courts of the U.S. Government itself.

Mr. Chairman, I do commend Ms. Cedarbaum to you.

The CHAIRMAN. I noticed you mentioned the name of John W. Davis, a candidate for President in 1924. What connection is there? She was not even born yet.

Senator MOYNIHAN. He had the necessary fortune not to be elected President, and so proceeded to establish an immensely successful law firm in New York called Davis, Polk & Wardwell. To be a partner of that firm is a measure of achievement by anyone's standard in New York City, sir.

The CHAIRMAN. Thank you very much, Senator.

We will now hear from Senator D'Amato.

STATEMENT OF HON. ALFONSE D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'AMATO. Mr. Chairman, I am pleased to join my distinguished colleague, Senator Moynihan, and commend his judicial committee for recommending to the President, Ms. Cedarbaum.

Ms. Miriam Cedarbaum, as Senator Moynihan has indicated, has distinguished herself in the academic area in the law review for Columbia University Law School. She has distinguished herself in the practice of law in a myriad number of undertakings, and I am very confident that she will be one of our most able and distinguished Federal district court judges in the southern district of New York.

I commend her and congratulate Senator Moynihan on his recommendation of Miriam Cedarbaum.

The CHAIRMAN. Thank you very much. Looking over her résumé, I notice she has had quite a bit of experience. She has been a law clerk to a Federal judge, an assistant U.S. attorney in the Department of Justice; practiced law; first assistant counsel on the Commission on Alcoholic Beverage Control; associate counsel for the Museum of Modern Art; justice for the village of Scarsdale; and presently practices with the Davis firm. That is quite fine experience you have.

I want to congratulate you on your appointment by the President and I want to congratulate you on your approval and the high remarks made by these distinguished Senators here, Senator Moynihan and Senator D'Amato.

Both of them are held in high esteem. They are in different parties and it is a high tribute to you that both of them have come together and endorsed you in such a fine way. We are very proud to have you here and will get to you in a few minutes. Thank you very much.

Ms. CEDARBAUM. Thank you very much.

Senator MOYNIHAN. Thank you, Mr. Chairman.

Senator D'AMATO. Thank you, Mr. Chairman.

The CHAIRMAN. All right. Now, we have got a vote on here. We will have to hurry. Senator Evans and Senator Gorton, for Mr. Robert J. Bryan, of Washington State, to be a U.S. district judge.

Senator SIMON. Mr. Chairman, in case I get tied up over there and I am not back here, I simply want to record that I have, as you know, stated from time to time when I have been unhappy with

the recommendations made by the Bar Association. They have not been strong recommendations.

This group of nominees we have today all come in with very high recommendations from the Bar Association, and I feel good about that and I am very pleased to see that, Mr. Chairman.

The CHAIRMAN. Those words coming from the spokesman of the Democratic Party speaks highly for you all. [Laughter.]

We are very pleased to have this able Senator here looking out for these judges. We work together on this and I am glad he said what he did.

We would be very pleased to hear from you now, Senator Gorton.

STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator GORTON. Mr. Chairman, Senator Evans and I are delighted to be here with Judge Bryan for two reasons. The first is that this specific position in the western district of Washington was appointed because of an immense need for an additional judge, especially in the southern division of that district.

And with the help of you, Mr. Chairman, and the committee, it is high time that that position was filled because it is greatly needed. Even more important is the fact that Senator Evans and I have an immense delight in introducing a candidate of such impeccable qualifications.

Robert Bryan first became a member of the bench when he was appointed to the Superior Court for Kitsap County in 1967 by the then Governor of the State of Washington, who sits on the other side of Judge Bryan right now.

He served for 17 years until his retirement from that position in 1984. Lawyer evaluation polls in the State of Washington ranked him either at the top or right at the top of all of the Superior Court judges in the State almost from the beginning of his career on the bench.

He was overwhelmingly characterized as excellent in each area of review in the way judges are reviewed there—legal ability, judicial temperament, availability, integrity, hard work, and the like—precisely the kind of person we need in our courts.

For the last 2 years, he has had a refresher in what it is like in the private sector in one of the most distinguished law firms in Seattle. His personal credentials match those of his professional credentials. He has given freely of his time not only to the legal community in the State of Washington, but to many other worthy causes as well.

I may say in passing, Mr. Chairman, if you notice any physical similarities between the judge here and our distinguished senior Senator from New Jersey, Mr. Bradley, I can tell you that Judge Bryan was also at one time an outstanding basketball player.

Like our great colleague, he maybe cannot get quite so far off the floor now as he could at that time, but it is simply another illustration of his success and of a background which is so broad and includes so many important positions as to make him overwhelmingly qualified for this position.

The CHAIRMAN. Thank you very much, Senator.

We will now hear from Senator Evans.

**STATEMENT OF HON. DANIEL J. EVANS, A U.S. SENATOR FROM
THE STATE OF WASHINGTON**

Senator EVANS. Thank you very much, Mr. Chairman. My senior colleague has adequately set forth the qualifications and the experience of Judge Bryan. I knew him long before the occasion that Senator Gorton mentioned last.

I enjoyed watching him as a hard-charging, tough basketball player at the University of Washington. It was only later, after he finished law school and became active in community affairs in his county and in the State of Washington and came to my mention as a recommendation of the Bar Association, that I had the opportunity to appoint him to the superior court.

I always felt that as Governor the most important appointments and among the most important decisions that one had to make were those which related to the judiciary. By and large, judges last in office a lot longer than Congressmen, Senators or Governors. Consequently the appointments you make are relatively permanent even when they are subject to regular election.

This was no exception. My appointment of Judge Bryan, to the Superior Court began a career which lasted for 17 years until he voluntarily stepped down from the bench a few years ago. Both Senator Gorton and I are absolutely delighted that he has been willing to put his name forward to once again assume an important post in a critically needed position. We are delighted to have him and commend him most highly to this committee.

The CHAIRMAN. Thank you very much

I want to congratulate you upon your appointment, Judge Bryan, by the President, and I also commend you for having the high endorsement of these two highly-respected members of the U.S. Senate. They have both taken the time to come here in person and speak nicely about you. That is a tribute to you and I should not think you will have very much trouble being approved here.

Thank you very much.

Mr. BRYAN. Thank you very much, Mr. Chairman.

The CHAIRMAN. Senator Levin, the bells are ringing, but if you will speak fast, maybe you can get through in 2 minutes and we can get over there in 3 more minutes and answer the rollcall.

**STATEMENT OF HON. CARL LEVIN, A U.S. SENATOR FROM THE
STATE OF MICHIGAN**

Senator LEVIN. Mr. Chairman, I will be very brief in light of the rollcall.

It is a pleasure to introduce to the committee Judge Larry Zatkoff. He is a circuit judge in Macomb County, formerly a probate judge. He has an excellent reputation. He is a workaholic. He demands very high standards from those whom he has worked with in private practice and those who appear before him as a judge, but he has applied those same very high standards to himself.

He is a firm and a fair judge. Fairness, of course, is the most important single attribute of a great judge, in my opinion. He is well qualified for this appointment. I know that his wife and four chil-

dren would love to be here today, but they cannot be, so let me just briefly say he is married. His wife is a schoolteacher. He and his wife have raised four children in Macomb County, and they and we are very proud of him and know that this Committee will promptly recommend his confirmation after they have had a chance to scrutinize his record.

The CHAIRMAN. Judge Zatkoff, I congratulate you on your appointment by the President, and also for having the approval of both of your Senators. They are both Democrats, both from the same party, but a different party from the President. They are highly respected.

We will take up your matter now in a few minutes after this vote when we come back.

Judge ZATKOFF. Thank you.

The CHAIRMAN. Thank you very much, Senator Levin, for being here.

Now, if all the appointees will stand up, I can swear you in now. We have six of them, I believe. Just raise your right hands.

Will the testimony you give in this hearing be the truth, the whole truth and nothing but the truth, so help you God?

Mr. MAGILL. It will.

Mr. BRYAN. It will.

Ms. CEDARBAUM. It will.

Judge HANSEN. It will.

Judge LAGUEUX. It will.

Judge ZATKOFF. It will.

The CHAIRMAN. Thank you; you can have a seat now. We will take a recess. Senator McConnell will probably finish this hearing, since I have got to go to the Armed Services Committee.

[A brief recess was taken.]

Mr. SHORT. The Chairman has not been able to return. However, Senator Riegle will introduce Judge Zatkoff at this time.

STATEMENT OF HON. DONALD RIEGLE, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator RIEGLE. Thank you. I want to take this opportunity to introduce to the committee a very distinguished constituent, Hon. Lawrence P Zatkoff, from the State of Michigan. Judge Zatkoff comes before this committee today to fill a vacancy on the U.S. District Court in Michigan's Eastern District.

Judge Zatkoff was raised and educated in Michigan and has been an active member of the legal community in my State for 20 years. His career has included 12 years in private practice, including the office of assistant prosecutor.

Upon leaving private practice in 1978, Judge Zatkoff was named probate judge in Macomb County for 4 years and has been a circuit judge since 1982. So he certainly brings very material experience as a judge to this very important new assignment.

I believe that he has the experience and the judgment and the sense of fair play that one looks for in a candidate for a Federal judgeship. I have talked with a number of people in Michigan across a broad spectrum of opinion who have observed him, who know him, who have seen him in action as a judge, and feel that he

has shown all of the qualities that are important to give us a sense of confidence that he will perform very ably and in a very even-handed manner as a Federal judge.

Therefore, I am here today to introduce him and to ask that the committee report favorably on his nomination.

Mr. SHORT. Thank you very much, Senator. I know the chairman appreciates your remarks and they will weigh heavily on his decision.

Senator RIEGLE. Thank you.

Mr. SHORT. Thank you.

We will continue to stand in recess until the return of the Chair.

[A brief recess was taken.]

Senator McCONNELL [presiding]. Will Mr. Magill come forward, please?

Have a seat. I am sorry to hold you up. The chairman has asked that I ask you several questions, Mr. Magill. You have been a practicing attorney for 30 years and now you have been nominated to be U.S. circuit judge for the eighth circuit.

As an appellate judge, you will be reviewing decisions of district court judges. What criteria do you intend to use in reviewing these decisions and trial records?

STATEMENT OF FRANK J. MAGILL, OF NORTH DAKOTA, TO BE U.S. CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT

Mr. MAGILL. Well, my criteria would be several, sir. First of all, as far as the *Eurie v. Thompson* cases are concerned, if a Federal district judge were involved in the determination of State law, I would use the clearly erroneous rule.

I would not overrule that district court judge, who may have more familiarity with the State law than I would. As far as jury cases are concerned on appeal, I would respect the seventh amendment that a jury trial should not be overturned.

I would give deference to the district court trial judge with respect, obviously, to matters of fact, his rulings on evidence, and I would only look really at errors of law. And if it was an error of law with regard to State law, I would use the clearly erroneous rule.

If it were an error of law with respect to Federal interpretation, Federal law, I would take a closer look at it.

Senator McCONNELL. Would you tell the committee what procedures you will follow in determining any potential conflicts of interest, and how do you intend to resolve them?

Mr. MAGILL. Well, I think, sir, I would follow Canon 2 of the Judicial Code of Ethics with respect to any conflict or any appearance of conflict, really the objective being the integrity of the judicial system and the stature in which it is held by the public in general.

Senator McCONNELL. Mr. Magill, what is the proper application of stare decisis in constitutional law? Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflicts with the Constitution, as that judge interprets it?

Mr. MAGILL. Well, if I get the scenario correctly that there is a lower court decision, not a U.S. Supreme Court decision, in conflict

with the Constitution, and if that should arise, I do not think I would follow stare decisis because the Constitution under the supremacy clause is supreme.

However, I do have a high respect for stare decisis. I believe that the American public relies upon stare decisis for matters of certainty and predictability in law.

Lastly, I would—other than under the scenario you posited, I would give great deference to long-standing rules that have much law behind them, either common law or otherwise. And if I felt that there was substantial law regarding either a matter of substantive law or possibly some evidence law, I would give deference to the legislative branch with respect to changing it.

Senator McCONNELL. OK, thank you, Mr. Magill.

Mr. MAGILL. You are welcome.

Senator McCONNELL. Are there any family or friends with you you would like to introduce?

Mr. MAGILL. Absolutely. I would like to introduce my wife, Mary Magill, and my daughter, Liz Magill. Liz, would you stand up, please?

[Ms. Magill stood.]

Mr. MAGILL. Liz is a sophomore at Yale, and her cousin over there is Bill Truesdale, who is a student at Georgetown Law School and a classmate of Sheila Simon, Senator Simon's daughter.

My brother, Dr. John Magill, from Santa Monica, is here, and my sister-in-law, Peggy Shine, from Washington, is here. And I think I have a daughter over here, Meg Connally, whose husband has just recently left the antitrust division of the Justice Department and is going into private practice.

Senator McCONNELL. Good. Well, I know you are all proud of Mr. Magill. Thank you very much for coming.

Mr. MAGILL. Thank you.

Senator McCONNELL. I would like to call now on Mr. Robert J. Bryan.

Mr. Bryan, the chairman has asked that I ask you three questions. You are a practicing attorney in the State of Washington. From 1967 to 1984, you served as a Superior Court judge for the Kitsap County Judicial District. Now, the President has nominated you to be U.S. district judge for the western district of Washington.

What do you feel will be the most rewarding aspect of serving in this capacity?

STATEMENT OF ROBERT J. BRYAN, OF WASHINGTON, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WASHINGTON

Mr. BRYAN. Well, Senator, as you indicate, I have had considerable judicial experience in the past and the most rewarding aspect of being a Federal judge, I expect, will be the same as being a State trial judge.

The toil in the fields of justice is its own reward, and I do not know if you have thought very much about what a judge does, but in the final analysis a judge every day, all day long, tries to do what is right under our system of justice, and that is a heady atmosphere.

When the system works and justice is done, the work is its own reward.

Senator McCONNELL. It has been suggested that our prisons turn prisoners into more professional criminals. What, in your opinion, can or should be done to improve prisoner rehabilitation?

Mr. BRYAN. In recent years, our State, as well as the Federal Government, has turned somewhat away from the treatment model of custody into a punishment model. The certainty of punishment is not all bad, but it seems to me that it is essential, while we have people in custody, that we attempt to get their attention and to change their lives in some way.

Almost all of the people that go into prison come out and become members of our society again, and if we do not do something to make changes in their lives while they are in custody, we can expect more crime from them.

So, while they are in prison, it seems to me that beside the punishment of being in prison, we should educate them, or at least give them the opportunity for education. We should give them the opportunity for job training. We should treat those who are in need of psychological or psychiatric treatment. We should make attempts at behavior modification. Perhaps most important, we should teach them how to work; how to get up in the morning and go to work and work all day productively and be proud of their work.

These are some of the things that I think we should do in our prison system. Unfortunately, the funds are not available for the kind of aggressive approach that I would like to see.

Senator McCONNELL. Thank you.

Are there ever any circumstances under which a judge should attempt to establish new judicial precedent, and if so, what criteria would you consider in order to determine the propriety of reversing existing precedent?

Mr. BRYAN. Well, of course, I speak from the position of a trial judge on that particular question, Senator. A trial judge rarely has a chance to change precedential rulings. Basically, what you do is try and figure out what the law is and apply that law.

On rather rare occasions, you have a chance to make law or to interpret law in ways it has not been interpreted before. In that effort, the important thing is to do justice to the litigants that are before you.

But when you are working in an area that may be establishing a precedent, you have to determine the law to be what is also fair to the larger population, the public at large. And you have to be sure that, as you choose a route to follow in a new legal area, that route will not only do justice to the people in court, but also to the rest of the public who may suffer under that same rule down the line.

Senator McCONNELL. Thank you. Do you have any family members or friends here you would like to introduce?

Mr. BRYAN. Yes, I do, Senator. My wife of 27 years, Cathy, is with me. Our sons are all spread all over from Japan to Seattle to Wenatchee, and they are a long way from this Washington, or else they would be with us, too.

Senator McCONNELL. Thank you very much.

Mr. BRYAN. Thank you.

Senator McCONNELL. I would like to call now Miriam G. Cedarbaum.

Ms. Cedarbaum, the chairman has asked me to ask you three questions. You have been a practicing attorney since 1954 and now you have been nominated for the position of U.S. district judge.

Do you foresee any difficulty in the transition from advocate to impartial jurist?

STATEMENT OF MIRIAM G. CEDARBAUM, OF NEW YORK, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

Ms. CEDARBAUM. I do not anticipate any difficulty, Senator McConnell. Indeed, I very much welcome the transition. I believe that my private experience in complex civil litigation and my public experience in criminal matters will stand me in very good stead.

In addition, I have been sitting for some years as the Village Justice of Scarsdale and I have tasted the satisfaction of being an impartial judge.

Senator McCONNELL. Would you give the committee your views on penalties that should be imposed for second and third-time drug violators?

Ms. CEDARBAUM. Well, of course, I would consult the particular statute involved, and in sentencing the specific facts and circumstances always play a role. But second and third drug offenders are by and large in the category that I call hard-core criminals.

And for hard-core criminals, it seems to me we have to remove them from society for a substantial period of time by substantial imprisonment.

Senator McCONNELL. In response to a portion of the committee questionnaire concerning judicial activism, you stated, in part:

Article III, Section 2, of the Constitution of the United States specifies the cases and controversies to which the judicial power of the United States shall extend. Thus, the Constitution not only limits the jurisdiction of Federal courts to particular subject matters and parties, but expressly restricts such jurisdiction to actual cases and controversies.

Section 1 of article III invests in the Congress plenary power to ordain and establish such inferior Federal courts as it sees fit. To what extent, as a direct function of that power, is Congress equally empowered to limit the jurisdiction of lower Federal courts over various classes of cases and controversies?

Ms. CEDARBAUM. Although there may be some limitations, as a general matter Congress has the power, I believe, to limit the categories of cases that inferior Federal courts may entertain.

The example that I think of most readily is diversity jurisdiction, which, I think it is generally agreed, Congress can eliminate if it chooses, and which Congress has restricted periodically over the years.

In addition, Congress has restricted jurisdiction by imposing amount in controversy standards for entry into the Federal court; now, only in diversity cases, but historically in Federal question cases as well.

Senator McCONNELL. Do you have any family members here you would like to introduce?

Ms. CEDARBAUM. Yes, indeed, I have many family members who came to see this, for us, very historic event, and I would like to introduce them.

My husband, Bernard Cedarbaum; my son, Daniel Cedarbaum, from Chicago, and his fiancée, Caryn Jacobs, also from Chicago; my son, Jonathan Cedarbaum, from the District of Columbia; my sister, Ruth Schapiro, and my brother-in-law, Donald Schapiro, from New York; and my nephew, Robert Schapiro, who came all the way from Stanford University in California.

Senator McCONNELL. Very good. We are glad to see you all here. Thank you very much.

Ms. CEDARBAUM. Thank you.

Senator McCONNELL. We have a vote, but I am going to press on a little bit further and see if there is some chance we can wrap this up before I have to go zipping out of here.

Judge Hansen.

**STATEMENT OF DAVID R. HANSEN, OF IOWA, TO BE U.S.
DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF IOWA**

Judge HANSEN. Thank you, sir.

Senator McCONNELL. Three questions, Judge Hansen.

You have served on the Iowa District Court since 1976. How do you feel personally about your own capacity at this point in your career to carry out the very significant power and responsibility of being a Federal district judge?

Judge HANSEN. Senator, I approach the prospect of discharging those responsibilities with both enthusiasm and confidence. My confidence comes from my 10 years as a trial judge because I have been applying the Iowa rules of evidence, the Iowa civil rules of procedure and the Iowa criminal rules of procedure, which very closely track their Federal counterparts, and I do not foresee any difficulty in making that switch and I am confident I can do it.

Senator McCONNELL. Briefly, what are your views on the primary purposes of the criminal justice system?

Judge HANSEN. Senator, the primary purpose of the criminal justice system is to protect the overwhelming majority of this Nation from the acts of those who decide they do not want to obey the law. I think protection of society is the overriding purpose of that system.

Senator McCONNELL. To what extent do you see the American system of federalism or division of responsibilities between the National and State governments as an institution for checking the abuse of government powers?

Judge HANSEN. Well, I think history teaches us that it exists for that purpose. History teaches us that the 10th amendment of the Constitution was adopted to insure that the States retain those powers that were not delegated to the National Government.

On the other hand, when the States exercise those powers, they must do so in a way that comports and does not derogate the rights we enjoy as Federal citizens under the 14th amendment.

Senator McCONNELL. Judge Hansen, do you have some family members here you would like to introduce?

Judge HANSEN. I wish I did, Senator. They were with me all last week for the judges' seminar, but we had to get the two boys back in school on Monday.

Senator McCONNELL. Thank you. Well, those of us who are about to rush to a vote are not as regretful as you are. [Laughter.]

Thank you very much.

Judge HANSEN. Thank you, sir.

Senator McCONNELL. Judge Lagueux.

Judge, since 1968 you have served as an associate justice of the Rhode Island Superior Court. This court, I believe, is a court of general trial jurisdiction. I am confident that you are very knowledgeable of State laws. I wonder, however, if you foresee any difficulty in the transition from the State court to the Federal district court.

**STATEMENT OF RONALD R. LAGUEUX, OF RHODE ISLAND, TO BE
U.S. DISTRICT JUDGE FOR THE DISTRICT OF RHODE ISLAND**

Judge LAGUEUX. I see no difficulty in making the transition. As a matter of fact, I have been very active in the area of constitutional law for many years both as a lawyer and as a trial judge. I have rendered many decisions in that field, and I trust that I will have the opportunity to render some decisions on the U.S. District Court for the District of Rhode Island in that area.

In addition, I am very familiar with the Federal Rules of Civil Procedure, also the Federal Criminal Rules and the Federal Rules of Evidence, because I have been active over the years on committees which used those as a model for drafting the comparable rules in Rhode Island.

I was also active as a trial lawyer in the Federal courts for 12 years before going on the State bench.

Senator McCONNELL. Do you feel that a district court judge should assume direct control over complex issues and cases in order to avoid delays and to effectively manage such cases?

Judge LAGUEUX. Yes; there is no question that judges have to take control of their calendars to move litigation along. Lawyers have a natural tendency to procrastinate and it is necessary to set guidelines for the lawyers to meet in order to bring the litigation to a conclusion.

Senator McCONNELL. Are there ever any circumstances where you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions can be detected either through the text of a provision or its surrounding legislative history?

Judge LAGUEUX. The answer to that is no. I think that the meaning of legislation must be determined by reference to the intent of the drafters of that legislation, and I think the same principle applies to constitutional interpretation.

There are certainly two views in the constitutional field I am of the strict constructionist view where we try to determine the intent of the original framers of the Constitution.

Senator McCONNELL. Thank you. Judge, do you have any family members here you would like to introduce?

Judge LAGUEUX. Yes, I do. I have my wife here, Denise.

Senator McCONNELL. Glad to see you. Thank you very much.

Judge LAGUEUX. Thank you, Senator.

Senator McCONNELL. OK, we have a real shot here, Judge Zatkoff. If we can zip right through these, we can all proceed right on.

STATEMENT OF LAWRENCE P. ZATKOFF, OF MICHIGAN, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN

Judge ZATKOFF. Thank you for staying, Senator.

Senator McCONNELL. Would you tell the committee how you would handle an instance in which counsel for one of the parties in your court was obviously not a skilled litigator and was not prepared to adequately represent the interests of his or her client?

Judge ZATKOFF. I would first take that individual aside out of the presence of the jury and counsel with that person. I would encourage that person to have another more experienced attorney help him or her with the case. If that did not work and I believed that the client was not receiving a fair trial, I would probably have to remove that attorney.

Senator McCONNELL. In his famous dissent in Plessey against Ferguson in 1893, Justice Harlan referred to our Constitution as colorblind. Would you agree with this characterization?

Judge ZATKOFF. I would agree that it is colorblind, blind to sex, race, and religious preference.

Senator McCONNELL. The phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority.

What does that term mean to you, "judicial activism?"

Judge ZATKOFF. That is tantamount to judicial legislation. In my opinion, that is wrong. It is incorrect for any judge to engage in that. I believe that the making of new law lies in the legislative branch of government.

Senator, I have no one to introduce. Unfortunately, my family could not be here. I would like to again thank you for staying.

Senator McCONNELL. Thank you, and I apologize to all of you for the delay. Congratulations to all the nominees and I hope you will enjoy your service on the bench.

This hearing is recessed.

[Whereupon, at 3:25 p.m., the committee was adjourned.]

BIOGRAPHIES

FRANK J. MAGILL

NOMINEE, U.S. CIRCUIT JUDGE, EIGHTH CIRCUIT

Birth: June 3, 1927, Verona, North Dakota.

Legal Residence: North Dakota.

Marital Status: Married to Mary Louise Timlin Magill, 6 children.

Education: 1947-1951—Georgetown University, School of Foreign Service, B.S.F.S. degree. 1951-1952—Columbia University, M.A. degree (1953). 1952-1953—University of North Dakota, Law School. 1953-1955—Georgetown Law Center, LL.B. degree.

Bar: 1955—North Dakota.

Military Service: 1945-1947—United States Navy, Yeoman Third Class.

Experience: 1955-present—Nilles, Hansen, Magill & Davies, Ltd., Associate 1955-1956, Partner 1956-present.

ROBERT J. BRYAN

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF WASHINGTON

Birth: October 29, 1943, Bremerton, Washington.

Legal Residence: Washington. *

Marital Status: Married to Cathy Ann Welander Bryan, 3 children.

Education: 1952-1956—University of Washington, B.A. degree. 1955-1958—University of Washington, School of Law, J.D. degree.

Bar: 1959—Washington.

Experience: 1959-1967—Bryan & Bryan, Associate, 1959-1963, Partner, 1963-1967. 1967-1984—Superior Court Judge, Kitsap County Judicial District. 1984-present—Riddell, Williams, Bullitt & Walkinshaw, Partner.

MIRIAM G. CEDARBAUM

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF NEW YORK

Birth: September 16, 1929, New York, New York.

Legal Residence: New York.

Marital Status: Married to Bernard Cedarbaum, 2 children.

Education: 1946-1950—Barnard College, B.A. degree. 1950-1953—Columbia University, Law School, LL.B. degree.

Bar: 1954—New York.

Experience: 1953-1954—Law Clerk to Hon. Edward Dimock, United States District Court, Southern District of New York. 1954-1957—Assistant United States Attorney, Southern District of New York. 1958-1959—Department of Justice, Court of Claims Section, Attorney. 1960-1962—Part-time Legal Practice. 1963-1964—New York State Moreland, Commission on the Alcoholic Beverage Control Law, First Assistant Counsel. 1965-1979—The Museum of Modern Art, Associate Counsel. 1978-present—Justice Court of the Village of Scarsdale, Acting Village Justice (1978-82), Village Justice (1982-present). 1979-present—Davis Polk & Wardwell, Associate (1979-1983), Senior Attorney (1983-present).

DAVID R. HANSEN

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF IOWA

Birth: March 16, 1938, Exira, Iowa.

Legal Residence: Iowa.

Marital Status: Married to Mary Virginia Lee Hansen, 2 children.

Education: 1956-1960—Northwest Missouri State University, B.A. degree. 1960-1963—George Washington University, School of Law, J.D. degree.

Bar: 1963—Iowa.

Military Service: 1964-1968—United States Army, Judge Advocate General's Corps, Captain.

Experience: 1963-1964—Jones, Cambridge & Carl, Law Clerk & Associate. 1968-1970—Don W. Barker, Esq., Associate. 1969-1973—Judge, City of Iowa Falls. 1970-1973—Barker & Hansen, Partner. 1973-1967—Barker, Hansen & McNeal, Partner. 1976-present—Judge, Iowa District Court.

RONALD R. LAGUEUX

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF RHODE ISLAND

Birth: June 30, 1931, Lewiston, Maine.

Legal Residence: Rhode Island

Marital Status: Married to Denise R. Boudreau Lagueux, 3 children.

Education: 1949-1953—Bowdoin College, A.B. degree. 1953-1956—Harvard Law School, LL.B. degree.

Bar: 1957—Rhode Island.

Experience: 1956-1962 Edwards & Angell, Associate. 1962-1965—Executive Counsel to Governor John H. Chafee. 1965-1968—Edwards & Angell, Partner. 1968-present—Associate Justice, Rhode Island Superior Court.

LAWRENCE P. ZATKOFF

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF MICHIGAN

Birth: June 16, 1939, Detroit, Michigan.

Legal Residence: Michigan.

Marital Status: Married to Nancy L. Chenhall Zatkoff, 4 children.

Education: 1957-1962—University of Detroit, B.S. degree. 1962-1966—Detroit College of Law, J.D. degree.

Bar: 1966—Michigan.

Experience: 1966-1967—Moll, Desenburg, Purdy, Glover & Buyer, Associate. 1967—Assistant Prosecuting Attorney, County of Macomb. 1967-1968—Moll, Desenburg, Purdy, Glover & Buyer, Associate. 1968-1978—LaBarge, Zatkoff & Dinning Associate (1968-1969), Partner (1969-1978). 1978-1982—Judge, Probate Court, County of Macomb. 1982-present—Judge, Circuit Court, County of Macomb.

CONFIRMATION HEARINGS ON: ERIC G. BRUGGINK, CON. G. CHOLAKIS, RAYMOND J. DEARIE, AND MARIAN B. HORN

WEDNESDAY, FEBRUARY 26, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 4:03 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Heflin and Simon.

Staff present: Duke Short, chief investigator.

STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. This hearing will come to order.

We are met this afternoon to hold hearings on certain Federal judges: Con. G. Cholakis, of New York, to be U.S. district judge for the northern district of New York; Raymond J. Dearie, of New York, to be U.S. district judge for the eastern district of New York, and also claims court judge, Eric G.—I believe you pronounce that Bruggink—of Virginia, to be a judge of the U.S. Claims Court, and Marian B. Horn, of Maryland, to be a judge of the U.S. Claims Court.

We might ask all of you to stand up and be sworn at one time. Just raise your right hands.

Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Judge CHOLAKIS. Yes.

Mr. DEARIE. Yes.

Mr. BRUGGINK. Yes.

Ms. HORN. Yes.

The CHAIRMAN. Thank you.

Now, first on here are Senator D'Amato and Senator Moynihan, if they are present.

Senator MOYNIHAN. We are, sir.

The CHAIRMAN. If you will come around, we would be glad to hear from you. Now, you are interested in Cholakis, Dearie, and Horn.

Senator MOYNIHAN. Mr. Chairman, would you like the nominees to come to the table?

The CHAIRMAN. It would be all right for them to come to the table.

All right, we will be glad to hear from you. Who wants to go first?

Senator MOYNIHAN. Mr. Chairman, these distinguished nominees are the particular recommendations of Senator D'Amato, my distinguished colleague, on this occasion, and while I fully support him, I would ask that the courtesy be given that he speak first.

The CHAIRMAN. Senator D'Amato, you may proceed.

**STATEMENT OF HON. ALFONSE D'AMATO, A U.S. SENATOR FROM
THE STATE OF NEW YORK**

Senator D'AMATO. Mr. Chairman, first of all, let me thank the senior Senator from New York, my colleague Senator Moynihan, who has worked with me on our screening committees in terms of doing two things.

I think it is important to note at this time that in trying to keep and maintain the highest professionalism possible to the U.S. attorney's office, we have agreed that our U.S. attorneys, irrespective of whoever may be in the White House, will serve out their full terms, and we have kept to that.

We have sought the best in terms of professionalism, and I think our committees have worked to insure that the best candidates and nominees for Federal judgeships will be a product that both of us work to ensure.

Mr. Chairman, I am going to ask that my full statement be entered into the record as if read in its entirety. But it is quite notable, I think, that one of those U.S. attorneys who indeed was a professional, who worked as an assistant U.S. attorney, chief deputy, and then became the U.S. attorney and has distinguished himself, is a nominee here today that our President has submitted from the eastern district, Raymond Dearie.

Raymond Dearie has distinguished himself as the U.S. attorney in the eastern district; he has distinguished himself in private practice. He has distinguished himself as a scholar, having been in a law review, and I am certain that he will continue in that fashion as he moves on to the eastern district Federal bench.

He has brought a number of cases that hopefully have brought the sorry spectacle of judicial corruption to an end. His office, with respect to his careful and sensitive undertaking so as not to tarnish a whole group, but to maintain its focus, has sought out corruption. He successfully prosecuted that case vigorously and brought it to a successful conclusion.

His work in the area of law enforcement, as it relates to narcotics and narcotics trafficking, is second to none. As you know, one of the great ports of entry is New York, and he has distinguished himself and the entire office in this area, and the legal community is proud of him.

Mr. Chairman, I am delighted to be able to second the President's nomination and commend him to you and to this committee.

In the case of Judge Cholakis, who sits on my right, Judge Cholakis was universally acclaimed by those who know him, Democrats and Republicans, for the northern district of New York.

He will be succeeding Judge Minor, who has moved up to the appellate court. He is a supreme court judge now of our State. Prior

to that, he was a county court judge, which was the court within his county charged with the responsibility of criminal prosecutions.

Prior to that, he was one of the most distinguished district attorneys to serve in that region of the State. He brings to the bench not only the scholarly aptitude necessary, but also the practical side as a prosecutor, as a judge, and as a very learned individual who had 17 years of private practice.

We are indeed fortunate that the President has selected Congressman Cholakis, and he will follow in the great tradition of those who have served in that area.

Mr. Chairman, I have here another great, unexpected privilege of being able to introduce to this committee, Marian Blank Horn as the President's nominee to be a judge of the U.S. Claims Court.

Although Ms. Horn was born and raised and educated in New York and graduated from Barnard College and received her law degree from Fordham University, she now lives in Maryland. Senator Mathias was not able to be here and is out of town today, but I am delighted to be able to say that she has a very substantial record as an attorney, qualifying her for the Court of Claims position.

She has been the principal deputy solicitor and acting solicitor for the Department of the Interior since 1985. She has acted as the main attorney for the Secretary and Under Secretary of the Interior, and has been an attorney at the Department of the Interior since 1983.

She certainly has gained experience with many of the issues brought before the Claims Court. So it is nice that we, Senator Moynihan and I, have an opportunity to add our comments and to introduce a former New Yorker who has done well here in Maryland.

Mr. Chairman, thank you for having given us the opportunity of submitting the names of these highly qualified candidates to you today. As I said, I do have a statement to be included in the record.

[Prepared statement follows:]

PREPARED STATEMENT BY SENATOR D'AMATO

Mr. Chairman it is a great pleasure to introduce to you and the Senate Judiciary Committee two very distinguished nominees for Federal Judgeships for the Northern and Eastern Districts of New York.

In New York State Supreme Court Justice Con. G. Cholakis, we have a nominee who is exceptionally well-respected in the judicial and legal community. The virtually unanimous support this nomination has received in the Northern District of New York is a tribute to his great ability, talent, and dedication. His record of distinguished service makes him an excellent choice to be a United States District Judge for the Northern District.

Con. Cholakis was elected to his present post on the State Supreme Court in 1977. For 3½ years prior to that, he was a Rensselaer County Judge. Con. Cholakis has also served as Rensselaer County District attorney and as First Assistant Public Defender in that county.

He practiced law in Troy, New York, in the firm of Cholakis, Morgan & Land from 1958 to 1971. He has tried cases at every level, including New York State's highest court, the Court of Appeals. This experience includes misdemeanor and felony trials, as well as an extensive civil and appellate practice.

Judge Cholakis has lectured extensively in the subjects of Evidence and Business Law. He is a graduate of Albany Law School and Siena College. Con. Cholakis entered the Marine Corps as a recruit in 1951. After serving with the First Marine Division during the Korean Conflict, he left as a sergeant in 1953.

Judge Cholakis has been active in numerous organizations, including the State District Attorneys Association, the Capital District Trial Lawyers Association, the Criminal Justice Coordinating Council, the Veterans of Foreign Wars, the Kiwanis Club, and in church activities. He is married and the father of three children.

Mr. Chairman, I thank you for the opportunity to present judge Cholakis. I am confident he will make a great Federal District Court Judge.

It is also a great pleasure and an honor to introduce Raymond J. Dearie to this committee as a nominee to be United States District Court Judge for the Eastern District of New York.

Since 1982, this outstanding nominee has served with great dedication, ability, and achievement as the United States Attorney for the Eastern District of New York. He has been tireless in his efforts and has scored many major successes fighting drug trafficking and public corruption.

Before President Reagan appointed him as United States Attorney, Ray Dearie was the Chief Assistant U.S. Attorney in the Eastern District for two years. Mr. Dearie also served from 1971 to 1977 as an Assistant U.S. Attorney in the Eastern District, where he held several key positions, including Chief of the Criminal Division and the Appeals Division.

From 1969 to 1971, he was an associate in the distinguished New York law firm of Shearman & Sterling. Between 1977 and 1980, he was counsel to another New York law firm, Surrey & Morse.

Raymond Dearie is a graduate of St. John's Law School, where he was Editor-in-Chief of the Law Review and the recipient of several honors. Since 1981, with all the demands on him as a Federal prosecutor, he has also found time to be an adjunct clinical professor of law at Brooklyn Law School.

Ray Dearie is married and the father of four children. He is a great lawyer and prosecutor. He will be a great Federal judge.

Thank you, Mr. Chairman.

PREPARED STATEMENT OF SENATOR D'AMATO

Mr. Chairman, I am also pleased to introduce to this committee Marian Blank Horn as the President's nominee to be a Judge on the United States Claims Court. Mrs. Horn was born, raised and educated in New York. She graduated from Barnard College in 1965, and received her J.D. degree from Fordham University School of Law in 1969.

Marian Blank Horn's very substantial record as an attorney qualifies her for the Claims Court. As Principal Deputy Solicitor and Acting Solicitor for the Department of the Interior since June, 1985, Ms. Horn has acted as the main attorney for the Secretary and Under Secretary of the Interior. As an attorney at the Department of the Interior since 1983, she has gained experience with many of the issues brought before the Claims Court. She has been responsible for numerous issues of great importance to the Department, including: matters involving Indian tribes; procurement contracts; disposal of government property; and claims under the Federal Tort Claims Act.

Mrs. Horn also has gained very extensive experience as an attorney with the Department of Energy between 1975 and 1981, and as Deputy Chief of the Appeals Bureau in the Bronx District Attorney's Office in New York.

Mr. Chairman, it is a pleasure to present this candidate to you and to this committee.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator. We are honored to have you with us.

Now, the senior Senator from New York, we are very pleased to have you with us.

STATEMENT OF HON. DANIEL MOYNIHAN, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator MOYNIHAN. Mr. Chairman, I have two statements I would like to be put in the record on behalf of these distinguished New Yorkers, Judge Cholakis and Mr. Dearie—and I am very happy to be here with Ms. Horn.

May I say that you have exceedingly capable candidates before this honorable committee; Justice Heflin would, I hope, agree. And the matter of their choosing is something that this committee might want to consider.

My distinguished colleague mentioned the arrangement that we have made in New York, and other States, I think, have since done, of recognizing that U.S. attorneys are appointed to a 4-year term.

We have worked out an arrangement whereby even when Presidents change, and parties, those 4-year terms are kept too. At the time that President Reagan and Senator D'Amato came to office, there was a gentleman in the eastern district of New York who was midway through his term, and Senator D'Amato very gallantly agreed to have him complete that term. He has since gone to the bench.

Mr. Dearie succeeded him and was extraordinarily successful. Senator D'Amato has mentioned some of the reasons why and now he will join his predecessor on that bench, and we are very proud of it—just as we are proud to see a member of the New York State Supreme Court go to the bench.

But I am going to impose on your patience 1 minute, Mr. Chairman, to make a point which I think sometimes we ought to make as we bring these people forward, these distinguished persons.

I was speaking to Mr. Dearie just before the committee was called to order, and I did mention the problem of judicial salaries. I just want to mention it again.

I noted that President Sovern of Columbia University recently remarked to me that law professors at Columbia Law School now make considerably more money than Federal judges.

Mr. Dearie mentioned to me that when he interviews candidates for assistant U.S. attorneys, almost invariably they are making more money than Federal judges.

I would hope that this honorable committee might take into its cognizance sometime—I know you do, Mr. Chairman—that we do have a problem on the bench. Indeed, I cannot imagine that you are not more aware of it than we, but I would hope that a nonlawyer might say that if you do want to make some measures in this, you certainly have my support from the testimony of the persons we bring before you.

Thank you, Mr. Chairman, and I do have two statements for the record.

[Prepared statement follows:].

STATEMENT BY SENATOR DANIEL PATRICK MOYNIHAN IN SUPPORT OF THE NOMINATION OF CON. G. CHOLAKIS TO BE U.S. JUDGE FOR THE NORTHERN DISTRICT OF NEW YORK

Mr. Chairman, I am privileged to introduce today a distinguished New Yorker and outstanding candidate for United States District Judge for the Northern District of New York, Con. G. Cholakis.

Mr. Chairman, Con. Cholakis is a candidate of high caliber, a man who has distinguished himself in his many years of public service, a commitment that began in 1951 with service as a Sergeant in the United States Marine Corps.

His subsequent experience as a partner in the law firm bearing his name and, then, as Assistant District Attorney for Rensselaer County, New York, as a public defender, District Attorney, Judge in Rensselaer County Court, and Justice in the New York State Supreme Court have given him the broad legal knowledge and expertise necessary to assume the post for which he has been nominated.

The judgeship for which Judge Cholakis has been nominated is unusually demanding, and I know that he is uniquely qualified to handle it.

Mr. Chairman, Judge Cholakis has my highest recommendation.

The CHAIRMAN. Thank you, Senator. We are very pleased to have you with us.

I want to congratulate these lawyers from New York for having both of their Senators in back of them, as well as congratulate them on their appointment by the President. By having both of these able Senators for you, I do not anticipate any problem with your confirmation.

We are very pleased they took time to come here. Senator D'Amato is on the majority side now and very busy and very influential. Senator Moynihan has been here for many years on the minority side and he is very influential.

We are very pleased to have you with us today, and thank you.

Senator MOYNIHAN. Thank you, Mr. Chairman.

Senator D'AMATO. Thank you, Mr. Chairman.

The CHAIRMAN. Senator D'Amato, I want to thank you also for presenting Marian B. Horn, of Maryland, since Senator Mathias is not here.

Senator D'AMATO. My pleasure, Mr. Chairman.

The CHAIRMAN. Our first hearing is on Judge Cholakis.

Judge Cholakis, without objection, I will just place your résumé in the record.

I notice you served in the Marine Corps for 2 years. You have practiced law in private firms. You have been assistant district attorney and district attorney in Rensselaer County in New York, and you are now a justice of the New York State Supreme Court in the Third Judicial District.

STATEMENT OF CON. G. CHOLAKIS, OF NEW YORK, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF NEW YORK

Judge CHOLAKIS. Yes, sir.

The CHAIRMAN. Incidentally, the first 6 months I spent in the Army in World War II, I was stationed at Albany, NY, down on the pier, not very far there from Troy. We are glad to have you with us.

Would you care to introduce your family or friends that you have with you today?

Judge CHOLAKIS. Yes, I would, Mr. Chairman; thank you very much. I would like to introduce my wife, Dassie, who sits on the right here; our son, George; and a friend that has traveled to Washington with us, Monica DeMartino.

The CHAIRMAN. We are very pleased to have you all with us.

Judge Cholakis, you have been a justice of the New York Supreme Court, Third Judicial District, since 1978, I believe.

Judge CHOLAKIS. That is correct, sir.

The CHAIRMAN. I believe this is a court of unlimited general jurisdiction, is it not?

Judge CHOLAKIS. It is, sir.

The CHAIRMAN. Do you have the power of capital punishment there?

Judge CHOLAKIS. No, sir. The criminal cases in upstate New York are generally handled by county courts. The supreme court does have jurisdiction, but they do not exercise it in upstate New York.

When I was county court judge, I handled criminal cases, but the death penalty is not presently in New York State.

The CHAIRMAN. New York State does not have the death penalty at all?

Judge CHOLAKIS. No, sir.

The CHAIRMAN. Do you foresee any difficulty in the transition from your present position in the New York State Supreme Court to that of a trial judge at the Federal district level?

Judge CHOLAKIS. No, sir, I do not. I think I am going to have to become familiar with the Federal practice and some of the Federal substantive sections or laws of which I am not familiar, but I think that the last 12 years on the State courts has given me a knowledge and experience which are transferable and would hold me in good stead if I am ultimately appointed to the district court.

The CHAIRMAN. I have seen some judges after they have been on the bench several years who have become rather arrogant. I have witnessed them embarrass jurors and attorneys and witnesses, and I think it is inexcusable.

I would like to ask you how you feel about handling a courtroom and whether you feel you can be courteous to all people at all times. A judge has unlimited power. There is no use for him to be arrogant and overbearing, is there?

Judge CHOLAKIS. No, sir, in my opinion, there is not. As a matter of fact, I think that is something that a judge has to recognize that when he is sitting on a case, it is not his case. The lawsuit belongs to the litigants, and courtesy to both the litigants and the attorneys is absolutely essential.

Without that, I think we have, at the very least, the appearance of denying justice to the litigants and, in some instances, the actual denial of justice.

The CHAIRMAN. Judicial temperament, I consider to be a prerequisite for a Federal judge. Do you have any other thoughts on that subject?

Judge CHOLAKIS. No, sir. I think the judge has to understand the law he is attempting to interpret and apply, and he has to be familiar with the procedures in order to apply it.

I think temperament, judicial temperament, is equally important, and in some instances even more important.

The CHAIRMAN. Article V of the Constitution establishes the procedures by which the Constitution is to be amended or altered. Do you believe that article V specifies the only means by which the Constitution should be amended?

Judge CHOLAKIS. Yes, sir, I do. I think the framers of our Constitution placed it there for a purpose in order to allow the mechanics by which the Constitution should be amended. And until article V itself is amended according to those procedures, I do not know of any other method by which the Constitution can be or should be amended.

The CHAIRMAN. Do you think Federal judges ought to write decisions that have the effect of altering or amending the Constitution, as some of them have done?

Judge CHOLAKIS. No, sir. I do not feel that that is the purpose of a Federal judge or any other judge. I think to do so is a usurpation of power.

The CHAIRMAN. Judge Cholakis, we frequently hear the argument that courts act in response to social problems because the legislature has failed to act on its own. How would you respond to this defense of an activist judiciary?

Judge CHOLAKIS. No, I do not think that that is the purpose or the function of the judiciary. The Constitution has set forth the powers which each branch of Government is to exercise, and I do not feel that the courts can go beyond that power which is given to them in the Constitution and usurp the powers of the legislature.

The CHAIRMAN. If the legislature has failed to act, that is their responsibility, is it not?

Judge CHOLAKIS. As far as I am concerned, it is, Mr. Chairman.

The CHAIRMAN. And it is not the judge's business to come in and supplement?

Judge CHOLAKIS. That has always been my position. As a matter of fact, in the supreme court where I sit in Albany, we review the activities of State agencies and we constantly have an invitation to alter their determinations. I do not see that as my function and I, to the best of my knowledge, have never done so.

The CHAIRMAN. I will now turn to the distinguished member from Alabama. Judge, do you have any questions?

Senator HEFLIN. I have no questions.

The CHAIRMAN. Thank you very much. You can retire and we will take the next nominee.

Judge CHOLAKIS. Thank you, Mr. Chairman. Thank you, Senator.

The CHAIRMAN. Senator Heflin, I believe, has some remarks about Mr. Bruggink, if he could come up. Senator Denton was listed here, too, but he is not here.

If you will have a seat, you have been appointed to be a judge of the U.S. Claims Court, I believe.

STATEMENT OF ERIC G. BRUGGINK, OF VIRGINIA, TO BE A JUDGE OF THE U.S. CLAIMS COURT

Mr. BRUGGINK. That is correct.

The CHAIRMAN. Do you want to introduce your family or friends who are here?

Mr. BRUGGINK. They are not available. My wife just had a baby, so she just got out of the hospital today.

The CHAIRMAN. Well, that is a good excuse. [Laughter.]

Senator Heflin, do you have a statement you want to make?

STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. Yes. I would like to present to the Committee Mr. Eric Bruggink, who has been nominated by the President to be a judge of the U.S. Claims Court. Mr. Bruggink currently resides in the Commonwealth of Virginia, but spent a number of years in Alabama.

He graduated from the University of Alabama School of Law in 1975, where he was on the Law Review as the case and comment

editor. He was also a Hugo Black Scholar, one of the highest honors for law students.

He served as a law clerk to the Honorable Frank McFadden, chief judge of the U.S. district court for the northern district of Alabama, and he practiced with the law firm of Hardwick, Hause & Segrest in Dothan, and later with the law firm of Steiner, Crum & Baker in Montgomery.

He served also as assistant director of the Alabama Law Institute, which is an official law reform agency for the State. In that capacity, he was responsible for drafting revisions to the Alabama Criminal Code, the Alabama Administrative Procedure Act, the State Corporation Code, and the Trial Judges Handbook.

Since 1982, he has been the Director of the Office of Appeals Counsel with the U.S. Merit Systems Protection Board.

We congratulate him on his nomination and look forward to his testimony here. I wish I could stay for the entire hearing, but I have some other things that are pressing that I have to go to

I also have a statement here from Senator Denton in support of Mr. Bruggink, and ask that his statement and a copy of my statement be entered in the record in full.

The CHAIRMAN. Without objection, that will be done.

[Prepared statements follow:]

PREPARED STATEMENT OF SENATOR HOWELL HEFLIN

Mr. Chairman, I present to the committee Mr. Eric G. Bruggink, who has been nominated by the President to be a judge of the United States Claims Court.

Eric currently resides in the State of Virginia, but he spent a number of years in Alabama.

Eric graduated from the university of Alabama School of Law in 1975 where he was the case and comment editor of the Alabama Law Review. Eric was also a Hugo Black Scholar, one of the highest honors for law students.

Eric served as a law clerk to the Honorable Frank McFadden, chief of the United States District Court for the Northern District of Alabama. He practiced law as an associate with the firm of Hardwick, Hause & Segrest in Dothan, Alabama, and later as an associate with the firm of Steiner, Crum & Baker in Montgomery, Alabama. In addition, Eric served as assistant director of the Alabama Law institute, which is the official law reform agency for the State. In that capacity, he was responsible for drafting revisions to the Alabama Criminal Code, the Alabama Administrative Procedure Act, the State Corporations Code, and the Trial Judges' Handbook.

Since 1982, Eric has been the director of the office of appeals counsel, with the United States Merit Systems Protections Board.

Eric, I congratulate you on your nomination and I look forward to hearing the testimony, and as always will keep an open mind throughout the confirmation process.

Thank you, Mr. Chairman.

PREPARED STATEMENT BY SENATOR JEREMIAH DENTON

Mr. Chariman, I am pleased to introduce Mr. Eric G. Bruggink, the President's nominee to be a judge on the United States Claims Court. Eric is uniquely qualified by his background and experience, and will serve with great distinction on the Federal bench.

In order to acquaint everyone with Eric's abilities and background, I will start by claiming him as a true Alabamian. Although Eric was born in the Dutch East Indies and was naturalized in Phoenix, Arizona, we Alabamians proudly call him ours. He attended the public schools in Ozark, Alabama, and graduated from Carrol County High School where his scholastic abilities were outstanding. Eric then went to Auburn University where he graduated *cum laude* in 1971 with a B.A. Eric received a M.A. in speech from Auburn in 1972. In 1975, he graduated from the Uni-

versity of Alabama School of Law. He attended Law School on academic scholarships, and was a member of the *Alabama Law Review*, serving as Case and Comment Editor in 1974-1975.

After law school, Eric served as a law clerk to the Honorable Frank M. McFadden, Chief Judge for the United States District Court for the Northern District of Alabama, in Birmingham. From there he became associated with the Dothan, Alabama, law firm of Hardwick, Hause & Segrest. In 1977, he became Assistant Director of the Alabama Law Institute in Tuscaloosa. In 1979, Eric became an associate with the law firm of Steiner, Crum & Baker in Montgomery. Throughout his practice in the private sector, Eric has had extensive practice before all levels of Federal and state courts.

In 1982, Eric became the Director of the Office of Appeals Counsel of the U.S. Merit Systems Protection Board. Eric has served with distinction in this position where he has been responsible for reviewing appeals from the Board's regional offices and preparing recommended dispositions for the three-member Board.

I am personally pleased for the country, and proud for our state, that President Reagan has chosen such a fine nominee for the U.S. Claims Court. I urge the members of this Committee to report the nomination to the full Senate for consideration.

Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Alabama is a prominent member of this committee, and that will not hurt you a bit in being confirmed. He is a very influential man here and I predict you will get out in short order.

Now, while you are up here, we want to ask you a few questions. Since 1982, I believe, you have served as the Director for the Office of Appeals Counsel, Merit Systems Protection Board.

Mr. BRUGGINK. That is correct, although recently I became Executive Assistant to Acting Chairman Maria Johnson.

The CHAIRMAN. Would you tell the committee briefly what your duties have been as Director and how this experience will be beneficial to you as a U.S. Claims Court judge?

Mr. BRUGGINK. Yes, sir. The Merit Systems Protection Board is the quasi-judicial body which handles Federal personnel actions. There are eleven regional offices which constitute the trial level and there is an appellate level here in Washington.

The Office of Appeals which I operated had a number of attorneys who were responsible for drafting opinions for the Board. That experience bears on my qualifications for the Claims Court position.

The Board is a quasi-judicial agency. What I have done for 3 years is supervise attorneys that drafted opinions, for the Board, based on a review of decisions of the trial level, the record below, and the parties' briefs.

The CHAIRMAN. Mr. Bruggink, the U.S. Claims Court was established on October 1, 1982. Would you tell the committee what benefits or problems, if any, you have seen arise out of the nationwide jurisdiction of the Claims Court?

Mr. BRUGGINK. It is my understanding that that is a carryover from the old Court of Claims procedure. I think it is a beneficial practice, although it is an inconvenience sometimes, as I understand it, for the judges.

As a practical matter, the Claims Court is small, and it would be administratively duplicative to have judges scattered all over the country with separate clerks. So I think it really is probably beneficial.

The CHAIRMAN. Now, the interlocutory jurisdiction of the Court of Appeals for the Federal Circuit does not permit review of Claims

Court decisions on liability before the quantum of damages has been determined in the case. Do you believe that this has adversely affected the productivity of the Claims Court?

Mr. BRUGGINK. I seriously doubt it. Again, looking as an outsider, it is my understanding that the old practice of bifurcating cases—permitting an appeal as to liability to the appellate level within the court of claims at the option of the party that lost—was frequently a time-wasting procedure.

Now that is not done as a matter of right, but as I understand, is done only on certification by the Claims Court judge. I think that is a better practice.

The CHAIRMAN. Mr. Bruggink, are there ever any circumstances under which a judge should attempt to establish new judicial precedent, and if so, what criteria would you consider in order to determine the propriety of reversing existing precedent?

Mr. BRUGGINK. Yes, I think sometimes circumstances require precedents be created. That is how we got our common law. Judges frequently are faced with situations where the statute is either not squarely on point or else there is no judicial precedent. So sometimes it is necessary. However, I think there are very strict limitations which apply under those circumstances. I think the courts need to be keenly aware of their limited role as interpreters of written words and not as policymakers.

The CHAIRMAN. The distinguished Senator from Illinois may have some questions.

Senator SIMON. Yes, and my apologies for not being here, and if I repeat questions, I hope you will excuse me.

I have just been handed a note here. The staff memo says you were a member of the Alabama State Textbook Committee. Is that correct?

Mr. BRUGGINK. Yes, sir, in 1982.

Senator SIMON. And it also says that you were part of a four-person minority recommending censorship of several works of literature in the public schools. Would you want to comment on that? Is that charge accurate or is that not accurate?

Mr. BRUGGINK. Well, I would certainly take issue with the word "censorship." Perhaps I could give you a bit of background. Alabama, like a number of States, has a statute which creates a State textbook selection committee. In Alabama's case, it only makes recommendations to the State board of education.

I was asked by Governor James to serve on that committee as one of several lay members. The majority of that committee is composed of professional educators, but the legislature decided in 1982 added some lay members to the committee. I agreed to serve, and I believed was the committee for about 4 months.

During that time we reviewed over 700 titles. I had to convert a bedroom to a library, and read most of those books. In that process, I voted along with the majority to adopt most of those books.

There were several books which received no votes. Some of us felt the attention of the board of education needed to be directed to some of those books, however.

We suggested that they would not be suitable for purchase at public expense and, therefore, become required reading for public

school students. That was merely a recommendation to the State board of education.

We found out the day of the vote that we would be permitted to file a minority report and still be allowed to vote with the majority, as I said, on most of the books. I think there were about eight books that we ended up saying we thought would not be suitable. This is a quick history.

Senator SIMON. Can you recall what those eight books were?

Mr. BRUGGINK. Not off the top of my head. I can tell you they were all English readers. Our concern was that, much more than the other books which we voted to approve, they contained a great deal of emphasis on violence.

I did not think they were sufficiently pro-family. They contained a lot of the occult. Every one of the books that we approved had elements of those things, frankly. However, we felt the books in the minority report emphasized them to such an extent that they just really were not suitable, but I certainly would not call that censorship.

Senator SIMON. I am interested because back when I was in the State Legislature in Illinois, they proposed having a State textbook committee and I opposed that, believing that it is not a wise thing to have a State board doing this.

Let me ask you, did you read the books that you recommended should not be approved?

Mr. BRUGGINK. I read probably 50 percent of them. I scanned the other 50 percent. The typical practice was that we had "readers" assist us. The ones they called our attention to, we would obviously read in their entirety.

We had 700 books to review and we had to read them in the space of about 3 months. This was while we were in other jobs. This was a nonpaid position. I was trying to keep up a law practice while reading through several hundred books.

Senator SIMON. For example, I gather—and I am a little unclear about what I am reading here now, but apparently one book, whatever the book's name is—on page 462 of a book which included the convention at Seneca Falls, it was objected to by Mary Love Eyster.

Mr. BRUGGINK. Eyster, Mary Love Eyster.

Senator SIMON. But it was objected to because of feminism. You do not recall anything about that?

Mr. BRUGGINK. I remember that comment made about one of the stories within one book. I do not remember the story, to tell you the truth, but that was one of the comments made.

As I recall, we gathered together the written comments of four or five people that voted against those titles and put a cover sheet on them and said we have serious questions about these books; please take a close look at them.

The head of the State board of education passed on our comments directly to the local boards. Neither the textbook selection committee nor the State board of education actually picks books. The local boards do all the selection.

The selection committee is expected to read and make comments. The minority report became part of the background material, as I recall, to the majority report.

Senator SIMON. Before the committee acts on your nomination, could you send me a letter just outlining what you did, the action taken?

Let me say, what I am particularly concerned about is first amendment sensitivity.

Mr. BRUGGINK. Certainly.

Senator SIMON. While the Court of Claims is not a court of general jurisdiction, I am interested in seeing to it that those who are in positions of responsibility like the one to which you have been nominated are people who are sensitive to first amendment freedoms.

So if you could send me a letter just kind of outlining what you did, the reasons for what you did, but also give me not a philosophical essay, but your gut instinct as to what the first amendment means.

Mr. BRUGGINK. I would be happy to. In fact, it is really ironic because one of the areas of practice that our firm specialized in in Montgomery was the first amendment. A case one of the partners tried was *New York Times v. Sullivan*. In fact, he was on the losing end of Sullivan many years ago. We also represented the local newspaper.

If I think of something as being dear and almost holy writ, to me it is the first amendment and the right of freedom of the press.

What the textbook selection committee did at the request of the Governor and the State legislature was nothing even remotely resembling censorship. Otherwise, I would not have had any part in it.

I will be happy to give you that statement.

Senator SIMON. All right. I would appreciate that. Just one other general question, the whole question of recognizing the rights of all Americans—what is your record in that record? Specifically, I am concerned about the area of civil rights and the rights of minorities.

Mr. BRUGGINK. I will take a cue from the committee questionnaire. There was a similar question in it and I responded to it with respect to a number of things that I have done.

I worked in the Fairfax County VA Legal Aid Clinic one summer as a full-time, unpaid staffer representing the rights of indigents and minorities.

When I was in practice in Dothan, AL, I did a lot of court-appointment work for a number of indigents and minorities. In Montgomery, I vigorously tried a title VII case—unsuccessfully—on behalf of an indigent client with no pay, at court appointment.

If you were to pursue my record for the last 3 years at the Merit Systems Protection Board, I think you would find that I have been very sensitive to the rights and interests of minorities and handicapped persons.

Senator SIMON. I thank you, and I will look forward to receiving your letter.

Mr. BRUGGINK. Yes, sir.

Senator SIMON. Thank you, Mr. Chairman.

The CHAIRMAN. Yes, sir, thank you.

I think that is all the questions we have. Thank you very much. Just have a seat, or you can retire if you wish.

Mr. BRUGGINK. All right.

The CHAIRMAN. Mr. Dearie.

Mr. Dearie, without objection, we will place your résumé in the record.

I believe you were born in Rockville Centre, NY.

STATEMENT OF RAYMOND J. DEARIE, OF NEW YORK, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NEW YORK

Mr. DEARIE. That is correct.

The CHAIRMAN. You went to school at Fairfield University and St. John's University School of Law. You have been assistant U.S. attorney for the eastern district of New York and you have served in the Crime Division and the Chief of the Appeals Division.

You served with Surrey & Morse, been chief assistant U.S. attorney, eastern district, and U.S. attorney. You are a U.S. attorney now?

Mr. DEARIE. Yes, Mr. Chairman, I am.

The CHAIRMAN. Well, that is good experience, U.S. attorney.

Mr. DEARIE. It certainly is.

The CHAIRMAN. Do you have any family or friends you would like to introduce?

Mr. DEARIE. Yes, if I may, Mr. Chairman. First of all, my wife, Susan Shepard—seeing Senator Simon, I should say from Park Ridge, IL; my 3-month-old, Teddy; and my brother-in-law, Angus McBath, who is a lawyer here in Washington.

The CHAIRMAN. Do you have one child?

Mr. DEARIE. I have four. Teddy is the only one here.

The CHAIRMAN. Oh, that is the youngest, I see.

Mr. Dearie, you have engaged in general litigation on both the State and Federal levels, I believe, in the State of New York.

Mr. DEARIE. That is correct, sir.

The CHAIRMAN. Now, do you believe litigants in State courts receive the same level of fairness, due process and quality of justice as do litigants in the Federal courts?

Mr. DEARIE. I think as a general answer, it is yes. I think there have been occasions, particularly in our larger metropolitan areas, where the local courts are pressed by staggering caseloads, where questions have been asked and questions as to the efficiency and perhaps the responsiveness of the local court system have been brought into question.

And I think, in fairness to the State system—and I note Judge Cholakis who preceded me here—the State is addressing many of those issues. They have gone to an individual calendar system, as we have in the Federal system, and I think that generally the concerns are being addressed today.

The CHAIRMAN. Mr. Dearie, one of the more significant areas you have pursued as U.S. attorney has been white collar crime, I believe, is it not?

Mr. DEARIE. That is correct, sir.

The CHAIRMAN. Do you believe that other prosecutors devote sufficient investigative resources to this subject, and would you please explain your answer?

Mr. DEARIE. I think, in fact, Mr. Chairman, none of us is satisfied with the amount of resources we are able to devote to white-collar crime. It happens, in my office, and I think characteristic to my district, we have devoted a substantial portion of our resources to white-collar crime, vital, I think, to the public confidence.

I think we have certain evidenciary advantages over some of our local colleagues. Indeed, in the city of New York our local practitioners or prosecutors are concerned with violent crime and quality of life types of things that do not give them the opportunity to pursue these things.

And I think ultimately the big test is that we are able to commit certain resources, a substantial portion of our resources, to white-collar crime, knowing that the possibility exists that the specific investigations may not be successful. That is what is required to do it well.

To do it successfully means or requires that you do it unsuccessfully from time to time.

Senator SIMON [presiding]. Mr. Dearie, I am asking you these next two questions on behalf of the chairman, who was called away on a telephone call.

The chairman has this question: You have also devoted substantial personal attention to investigations involving international-based narcotics smuggling operations. I am confident that as a result of this activity, you have gained considerable insight into the drug problem facing our society.

Could you give the committee your views on what actions should be taken to stem the flow of illegal drugs into the United States? Just a minor question we are tossing your way.

Mr. DEARIE. For which I have 2½ hours, no doubt.

Well, very briefly, I think the first thing that jumps into my mind is we have to continue to make some of the progress we have made offshore. The judicial agreements that this Congress has given us and previous Congresses have given us have become a mainstay in the fight in border districts such as the eastern district of New York where, on an average week, without exaggeration, we entertain foreign visitors, foreign prosecutors, from different countries. That has made an enormous difference.

Second, I think domestically we have begun to focus with some degree of success, I believe, on the organizations responsible for the importation. Ultimately, I would not want my remarks to be completed without saying, as I think prosecutors have begun to say, that the way to stop the flow is to do something about the demand.

I think prosecutors are finally stepping forward and saying we cannot rely on public prosecutors to deal with the problem; it is not the answer. Education not only of the young, but education of the young and old, is a critical element in any long-term solution to the problem.

I think the tide there has begun to change, and I am delighted to be one of the prosecutors that has urged it.

Senator SIMON. Thank you. This is another question the chairman wished to have asked: In response to a portion of the committee questionnaire concerning judicial activism, you stated, in part, and I am quoting, "Courts must resist invitation to go beyond the

confines of a particular controversy to address perceived inadequacies or even inequities."

What actions do you feel the Federal judiciary should take when confronted with such a situation?

Mr. DEARIE. Well, I think the Federal courts, particularly the district court, the trial court—I approach that question as a practitioner, thinking to myself what is it I want out of the judge who is hearing a particular case.

I think, in its simplest form, district judges and trial judges are paid to make decisions within the controversy or the context of the issues presented and in dispute. Because of the process, the litigative process, almost inevitably judges are invited to go beyond that controversy, invited to step outside the issues that are specifically in dispute and cast broad remedies that are either not necessary or inappropriate.

I think it calls for restraint in the district court. I think the temptation is there regularly, and I think that we have to, in fact, instead, defer to those bodies, such as the Congress and the Executive, who are empowered to make or propose laws and who are, therefore, through the democratic process accountable to the people.

I do not think the judiciary is accountable or that the Constitution intended it, and therefore I would exercise restraint and try to limit my actions as a district judge to resolving the specific controversy that is presumably properly before me.

Senator SIMON. First of all, anyone who shows the good judgment to marry a young lady from Illinois obviously has a great advantage in this committee. The only thing better would have been to marry a South Carolina girl. [Laughter.]

I notice your background in legal services. How do you think that is going to help you as a judge?

Mr. DEARIE. I think it has helped me as a prosecutor and, in turn, I think it will help me as a judge. OEO, as you well know, underwrote the cost, or the establishment and cost, of legal services corporations throughout the entire country.

During my relatively brief tenure with OEO, I had occasion to travel to these agencies and not only see the lawyers, but, as part of the project, to interview and spend a considerable amount of time with the clients.

It was, candidly, the first time that I had the opportunity to be with and around and speak to people far less fortunate than myself who, circumstances required, were drawn to the judicial system for some form of relief which they desperately, in many cases, needed.

It was a sensitive experience for me, something that I will certainly not forget. Hopefully, it will enable me to be reminded rather constantly that I am there to serve the people on the other side of the bench and to conduct myself accordingly and to be available to them as a trial judge.

Senator SIMON. In the process of your securing this nomination, has anyone asked you questions that you felt were in any way unethical?

Mr. DEARIE. No, sir.

Senator SIMON. Has anyone asked you how you would rule on such-and-such a case?

Mr. DEARIE. No, sir; no, sir. To be candid, I answered that question quickly because based upon everything I had read and heard, I would not have been surprised had I been given a question of that sort, but I did not receive anything like that during my discussions prior to the nomination.

Senator SIMON. I have no further questions. We thank you very much for being here.

Mr. DEARIE. Thank you, Senator.

Senator SIMON. Marian B. Horn, of Maryland?

I understand you have family with you, Ms. Horn. Would you like to introduce them?

**STATEMENT OF MARIAN B. HORN, OF MARYLAND, TO BE A
JUDGE OF THE U.S. CLAIMS COURT**

Ms. HORN. I would; thank you, sir. I have with me my father, a former judge; my mother; my mother-in-law; my husband; and my three children.

Senator SIMON. And what are your children's names? We had better get that in the record here, too.

Ms. HORN. My daughter, Julie, at the end, is 12, and my two daughters' Rebecca and Carrie, are both 9.

Senator SIMON. We are happy to have all of you here.

If I may ask questions first in behalf of the chairman, I am asking four questions in his behalf. Ms. Horn, you have been a practicing attorney since 1969. Now, the President has nominated you to be a judge of the U.S. Claims Court.

Could you tell the committee what steps you have taken to prepare yourself for this important position?

Ms. HORN. I think my record is one of essentially public service more than any other part of practice, and so I think that over the years I have had occasion, particularly in the Federal service, to prepare myself for the kinds of cases that come before the Claims Court.

I think I have seen many of the cases and supervised many cases that have actually been before the court, so I think I am ready to handle them.

The CHAIRMAN [presiding]. Ms. Horn, rule 77 of the Claims Court requires random assignment of cases by the clerk. Do you feel that a court rule is sufficient to avoid specialization within the court if that legislation similar to the Federal Court Improvement Act pertaining to the Court of Appeals for the Federal Circuit should be mandated for the Claims Court?

Ms. HORN. I think the system of random selection that is working in the court now is sufficient. It seems to be working well, and there are only very few minor exceptions, as I understand it, to totally random selection that are based on either recusal or compilation of cases that are related.

The CHAIRMAN. Ms. Horn, the jurisdiction of the Claims Court includes limiting authority to issue preaward injunctions in Government contract cases. Do you believe that sufficient standards exist to guide the Claims Court judges in the exercise of this authority?

Ms. HORN. Well, as you know, sir, this is an area that is somewhat complicated at the moment, and there is a bill pending, I believe, addressing this issue. I think the issue is whether it is exclusive jurisdiction with the Claims Court and there is certainly some confusion at the moment.

The CHAIRMAN. Ms. Horn, would you tell the committee how you will resolve any potential conflicts of interest, including the procedures you will follow in determining these areas of concern?

Ms. HORN. Well, sir, I do believe the judges have a higher than normal standard of having to avoid conflicts of interest. I believe that any such resolutions would have to be done on a case-by-case basis.

In my particular situation, I do not believe that I have any financial interests that are likely to cause conflicts of interest. I may have situations in which I have participated while in the executive branch of the Government, and I will review those very carefully on a case-by-case basis.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Have you visited the Court of Claims? I have to confess, I have never visited the Court of Claims myself, but have you?

Ms. HORN. Yes, I have, sir.

Senator SIMON. And have you had any experience in the Court of Claims at all?

Ms. HORN. I have not actually prosecuted a case before the Court of Claims, but I have supervised cases while at the Department of the Interior that were in the Court of Claims, yes, sir.

Senator SIMON. So you have confidence that you could move into such a position and handle it well?

Ms. HORN. I hope so, and I believe so.

Senator SIMON. One of the canons of ethics of the Bar Association, if I can find it here somewhere—Canon 2: Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged.

Can you tell me what you have done to fulfill that particular part of the canons?

Ms. HORN. First of all, while I was in law school and then while a practicing attorney, I have done a certain amount of pro bono work. I did that while I was practicing with a law firm here in town. I have also done some pro bono work, with the permission of my supervisors, while in the executive branch, so that I have tried to, time permitting, continue to do that kind of work.

Senator SIMON. Did anyone indicate to you, if you got on the Court of Claims, how you should—you ought to really be squeezing the dollar down to save money for the Federal Government, or anything like that?

Ms. HORN. No, sir, I have had no discussions of that sort.

Senator SIMON. No one asked you anything that you felt was in any way unethical?

Ms. HORN. Not at all.

Senator SIMON. I have no further questions, Mr. Chairman. I thank you very much.

Ms. HORN. Thank you.

The CHAIRMAN. That completes the questions. Thank you very much.

Ms. HORN. Thank you, sir.

The CHAIRMAN. I hope you enjoy your service on the bench.

Now, under the arrangements we reached between the Republican and the Democratic leaders on these questions, the nominations will not be on the agenda this Thursday, but a week from tomorrow they ought to be on the agenda for consideration, the 6th of March.

We now stand adjourned.

[Whereupon, at 4:54 p.m., the committee was adjourned.]

BIOGRAPHIES

CON. G. CHOLAKIS

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF NEW YORK

Birth: October 6, 1930, Troy, New York.

Legal Residence: New York.

Marital Status: Married to Dassie Michaels Cholakis, 3 children.

Education: 1950-1955—Siena College, B.A. degree. 1955-1958—Albany Law School, LL.B. degree.

Bar: 1958—New York.

Military Service: 1951-1953—United States Marine Corps, Sergeant.

Experience: 1958-1960—Dwyer, Fogarty & Ormsby, Associate. 1960-1967—Cholakis, Morgan & Lang, Partner. 1963-1965—Assistant District Attorney, Rensselaer County. 1966-1967—First Assistant Public Defender, Rensselaer County. 1968-1970—Sole practitioner. 1968-1974—District Attorney, Rensselaer County. 1974-1977—Judge, Rensselaer County Court. 1978-present—Justice, New York State Supreme Court, Third Judicial District.

RAYMOND J. DEARIE

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF NEW YORK

Birth: June 4, 1944, Rockville Centre, New York.

Legal Residence: New York.

Marital Status: Married to Susan Engelke Shepard, 3 children.

Education: 1962-1966—Fairfield University, A.B. degree. 1966-1969—St. John's University, School of Law, J.D. degree.

Bar: 1969—New York.

Experience: 1969-1971—Shearman & Sterling, Associate. 1971-1977—Assistant U.S. Attorney; Eastern District of New York Exec. Asst., 1977, Chief, Crim. Div., 1976-1977; Chief, Gen. Crimes Sec., Crim. Div., 1974-1976; Chief, Appeals Div., 1973-1974. 1977-1980—Surrey & Morse, Counsel. 1980-1982—Chief Asst. U.S. Attorney, Eastern District of New York. 1982-present—United States Attorney, Eastern District of New York.

ERIC G. BRUGGINK

NOMINEE, JUDGE, U.S. CLAIMS COURT

Birth: September 11, 1949, Kalidjati, Dutch East Indies.

Naturalized: November 21, 1960, Phoenix, Arizona.

Legal Residence: Virginia.

Marital Status: Married to Melinda Ann Harris Bruggink, 1 child.

Education: 1967-1971—Auburn University, B.A. degree. 1971-1972—Auburn University, M.A. degree. 1972-1975—University of Alabama, J.D. degree.

Bar: 1975—Alabama.

Experience: 1975-1976—Law Clerk, Hon. Frank M. McFadden, Northern District of Alabama. 1976-1977—Hardwick, Hause & Segrest Associate. 1977-1979—Alabama

Law Institute, Assistant Director. 1979-1982—Steiner, Crum & Baker Associate. 1982-present—U.S. Merit Systems Protection Board, Office of Appeals Counsel, Director.

MARIAN BLANK HORN

NOMINEE, JUDGE, U.S. CLAIMS COURT

Birth: June 24, 1943, New York, New York.

Legal Residence: Maryland.

Marital Status: Married to Robert Jack Horn, 3 children.

Education: 1961-1962—Barnard College, A.B. degree. 1962—Cornell University. 1965—Teachers College, Columbia University. 1965-1966—New York University. 1966-1969—Fordham University, Law School, J.D. degree.

Bar: 1969—New York. 1973—District of Columbia.

Experience: 1969-1972—Deputy District Attorney, Bronx County, New York, Deputy Chief, Appeals Bureau. 1972-1973—Arent, Fox, Kintner, Plotkin & Kahn, Associate. 1973-1976—American University, Washington College of Law, Adjunct Professor of Law, Project Director, LEAA Grant. 1975-1976—Office of General Counsel, Litigation Section, Federal Energy Administration, Attorney. 1976-1981—Department of Energy. 1976-1979—Office of General Counsel, Strategic Petroleum Reserve, Attorney. 1979-1981—Financial Incentives, Deputy Assistant General Counsel. 1981-present—Department of Interior. 1981-1983—Surface Mining Division, Deputy Associate Solicitor. 1983-1985—Division of General Law, Associate Solicitor. 1985 to present—Principal Deputy Solicitor, and Acting Solicitor.

CONFIRMATION HEARING ON: J. DANIEL MAHONEY AND BARBARA K. HACKETT

WEDNESDAY, MARCH 5, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2 o'clock p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Simon, Specter, and McConnell.

Staff present: Duke Short, chief investigator, and Laurie A. Westley, chief counsel for Senator Paul Simon.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We are meeting today to have a hearing on two judges. One is Judge Daniel Mahoney, of New York, to be U.S. circuit judge for the second circuit. I believe he is your recommendation, isn't he?

Senator D'AMATO. He is, Mr. Chairman.

The CHAIRMAN. And Senator Moynihan, I understand, is caught in traffic and will probably be here later, so he can come and join you at the table if he wishes to.

The other is Barbara K. Hackett, of Michigan, to be U.S. district judge for the eastern district of Michigan.

At this point, I wish to place a prepared statement of Senator Levin into the record.

[Statement follows:]

PREPARED STATEMENT OF SENATOR CARL LEVIN

Mr. Chairman. It is a pleasure to introduce to the Committee Barbara Hackett, who has been nominated to be United States District Judge for the Eastern District of Michigan. Mrs. Hackett's nomination has been strongly endorsed by the President of the Women Lawyer's Association in Michigan and by others who have worked with her, such as retired Court of Appeals Judge T. John Lesinski.

Barbara Hackett has gained experience in a variety of positions she has held in the Eastern District of Michigan. She began her career as a Law Clerk to former U.S. District Judge Frank Picard in the early 50's and practiced law as a sole practitioner between 1953 and 1965. Mrs. Hackett was the Assistant Prosecuting Attorney in Wayne county, Michigan, between 1967 and 1972. Between 1973 and 1984 she was the U.S. Magistrate for the Eastern District of Michigan.

While pursuing her career in law, Mrs. Hackett and her husband have raised a family of seven daughters. I know how proud Barbara Hackett's family and community are today. I'm delighted to introduce her to the Judiciary Committee.

The CHAIRMAN. You may proceed, Senator D'Amato.

**STATEMENT OF HON. ALFONSE M. D'AMATO, U.S. SENATOR,
STATE OF NEW YORK**

Senator D'AMATO. Mr. Chairman, thank you for the opportunity to present to you Mr. J. Daniel Mahoney.

Dan Mahoney, Mr. Chairman, has been a distinguished member of the Bar for the past 30 years. One of his few faults is his loyalty to friends. I claim that friendship, and it was a battle of friendship over good judgment, you see, Mr. Chairman, that some 6 years ago brought Mr. Mahoney, in his capacity as the chairman of the Conservative Party of the State of New York, to endorse and support a young local supervisor by the name of Alfonse D'Amato for the office of U.S. Senate. Without that support, Mr. Chairman, there is no way that I could have possibly——

The CHAIRMAN. In other words, without him, you would not be here now; is that it?

Senator D'AMATO. There is no way that I would have been here to be able to present him, and so it is a great pleasure to have that opportunity to present a friend, a colleague, someone learned in the law, a distinguished lecturer, author, one of the finest trial lawyers and appellate lawyers in our great State; who graduated with a law degree from Columbia University, fifth in his class, in 1955; who served this country as a commissioned officer on active duty in the U.S. Coast Guard from 1955 to 1985; who has had a distinguished career and is now a partner in the law firm of Senator Ives.

Mr. Chairman, the litany of Dan Mahoney can go on and on and on. But let me simply say that I am pleased to present him to this committee for your favorable consideration, and I believe that our President has made one of his outstanding recommendations.

In addition today, Mr. Mahoney has his lovely wife, Katherine, and his daughter here with him. I might say that his son, Kieran, is now the legislative director for one of our New York State Congressmen, and served me ably as my chief legislative officer for 3 years. So it is a family steeped in the tradition of service to government.

I think it is worthy of note that Mr. Mahoney, as so many others, makes a great, great financial sacrifice in undertaking this position. I know that he will distinguish himself during the course of his tenure, as he has always distinguished himself in all of his endeavors.

Of course, I am pleased to be joined here at this occasion and time by our senior Senator from the State of New York, Senator Moynihan, and I know he would like to say some words on behalf of Mr. Mahoney.

But it is a great personal privilege for me to be able to present him to this committee today.

The CHAIRMAN. Thank you very much, Senator D'Amato.

[Prepared statement follows:]

PREPARED STATEMENT OF SENATOR D'AMATO

Mr. Chairman, it is a great pleasure to introduce to you and the Senate Judiciary Committee J. Daniel Mahoney as the President's nominee to be a United States Circuit Court Judge on the Second Circuit Court of Appeals. As one of New York

State's most distinguished and capable attorneys, Mr. Mahoney is exceptionally well qualified for this most important position.

I am very pleased that, with Mr. Mahoney today, are his wife of thirty years, Kathleen O'Doherty Mahoney, and two of their six children, Elizabeth and Kieran.

Daniel Mahoney will bring to the Federal bench great personal, scholarly, and professional distinction. He graduated magna cum laude from Saint Bonaventure University in 1952. He received his law degree from Columbia University, graduating fifth in his class, in 1955.

From 1955 to 1958, Daniel Mahoney served his country as a commissioned officer on active duty in the United States Coast Guard. Upon leaving the Coast Guard, he became an associate in the New York law firm of Simpson Thacher & Bartlett, and worked for that firm until 1962.

Daniel Mahoney is truly one of the leading public figures in New York State. In 1962, he became the State Chairman of the new political party that he helped organize, the Conservative Party of New York State. In addition to pursuing his legal career, Daniel Mahoney has served as Chairman of the Conservative Party ever since.

From 1966 to 1974, Mr. Mahoney was a member of the New York law firm of Wormser, Kiely, Alessandrini, Mahoney & McCann. He has been a member of the law firm of Windels, Marx, Davies & Ives since 1974.

Daniel Mahoney has been a member of the Board of Directors of National Review, Inc. since 1972; a member of the Board of Fellows of the Polytechnic Institute of New York since 1981; and a member of the Dean's Advisory Council at the Hofstra University School of Law since 1982. He was recently appointed to the Advisory Council of Pace University.

Mr. Mahoney is the author of numerous works, including *Actions Speak Louder: The Story of the New York Conservative Party*; two tax management portfolios published by the Bureau of National Affairs; and articles published by *Business Lawyer* and *The American Bar Association Journal*.

Mr. Chairman, Daniel Mahoney will bring to the bench great intellectual and moral strength, together with great compassion and true wisdom. I thank you for the opportunity to present this excellent nominee. I am confident he will make a great Circuit Court Judge.

The CHAIRMAN. Senator Moynihan, we would be glad to hear from you.

**STATEMENT OF HON. DANIEL PATRICK MOYNIHAN, U.S.
SENATOR, STATE OF NEW YORK**

Senator MOYNIHAN. Thank you, Mr. Chairman. I want to join my colleague and friend, Senator D'Amato, in recommending to this honorable committee J. Daniel Mahoney for the position of U.S. circuit judge for the second circuit.

I have a statement which I would like to place in the record, Mr. Chairman, and simply reinforce the statements of my colleague.

Mr. Mahoney has practiced law diligently and successfully for any number of years in New York State and he has been, I think it is important to note, a man very active in public affairs. He was vice chairman and then chairman for a very long while of the Conservative Party of New York State, and will bring to the bench, I am sure, an understanding of the minutiae of politics as well as its large and proper purposes. I had the most agreeable conversation with him earlier, and I am happy to join in recommending him to this honorable committee.

The CHAIRMAN. Thank you very much.

[Statement follows:].

PREPARED STATEMENT OF SENATOR DANIEL PATRICK MOYNIHAN

I am privileged to introduce a distinguished New Yorker; now candidate for United States Judge for the Second Circuit, J. Daniel Mahoney.

Mr. Chairman, J. Daniel Mahoney is a candidate of high caliber, a man who has distinguished himself since his days as a student at one of this Nation's top schools of law, Columbia University Law School.

Mr. Mahoney's dedication to public service is exemplary. It has included service as the Vice Chairman and Chairman of the Conservative Party of New York and service on the Dean's Advisory Council of Hofstra Law School, as well as several other advisory council of Hofstra Law School, as well as several other advisory councils and boards.

Mr. Mahoney has been affiliated with several fine New York law firms since 1958, where he has undertaken a broad range of legal tasks.

He is the author of a published history of the New York State Conservative Party, and several articles that have appeared in distinguished journals such as the New York Law Journal, the Business Lawyer, and the National Review, on whose Board of Director he serves.

Mr. Chairman, the judgeship for which J. Daniel Mahoney has been nominated is unusually demanding, and I know that he is a man well-qualified to assume this post.

J. Daniel Mahoney has my highest recommendation.

The CHAIRMAN. Mr. Mahoney, I want to congratulate you upon your selection by the President and congratulate you on having the endorsement of Senator D'Amato. He has been here only one term, but he has made an outstanding Senator. And I am very pleased that Senator Moynihan has endorsed you so highly. He is a very influential Senator also.

So you have both of your Senators—one is a Democrat and one is a Republican—so you must be a pretty good man.

Senator MOYNIHAN. Mr. Chairman, may I say he is not an unfailingly successful one. If he had had his way in 1976, I would not have been on the ballot, and would not be here to recommend him. But we won the case. [Laughter.]

The CHAIRMAN. Well, that shows what a broad-minded man, you are.

Mr. MAHONEY. I will second that, Senator.

The CHAIRMAN. And it shows your high admiration for great legal ability in him, doesn't it?

Senator MOYNIHAN. It does, sir.

The CHAIRMAN. Thank you all for being here.

These Senators are always so busy, so they are excused unless they want to stay. You keep your seat, Mr. Mahoney.

Senator MOYNIHAN. Thank you, Mr. Chairman.

Senator D'AMATO. Thank you, Mr. Chairman.

The CHAIRMAN. Now, Mr. Mahoney, if you and Mrs. Hackett would both stand up, I will swear both of you.

Do you swear the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. MAHONEY. I do.

Mrs. HACKETT. I do.

The CHAIRMAN. Thank you. Have a seat.

Mr. Mahoney, we will ask you a few questions here, and without objection, we will place a brief résumé of you in the record.

I see you have, from your résumé a very impressive record. You were in the Coast Guard for 3 years, I believe.

TESTIMONY OF J. DANIEL MAHONEY, OF NEW YORK, NOMINATED TO BE U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT

Mr. MAHONEY. That is right, Senator.

The CHAIRMAN. And you practiced law from the time you finished law school. You graduated from law school in 1955, and you went in the Coast Guard immediately, I believe, 3 years, and you have practiced law since that time.

Mr. MAHONEY. With a 3-year interim, Senator. From 1962 to 1965, I was engaged full time in starting the Conservative Party.

The CHAIRMAN. Oh, you were full time on that at that time. I see.

Mr. MAHONEY. Yes. With that exception, Senator, I have practiced law ever since.

The CHAIRMAN. Thank you very much.

Mr. Mahoney, in reviewing your file, I note that you are the chairman of the Conservative Party of the State of New York. In your position as chairman, you were named in a complaint filed with the Federal Election Commission in December 1984. Would you please tell the committee briefly the circumstances surrounding the filing of this complaint, and specifically was the complaint filed against you personally or against the Conservative Party of the State of New York?

Mr. MAHONEY. It was filed against the Conservative Party and against a number of the officers of the party in their capacity as officers of the party. It was filed against me as State chairman.

The complaint springs from a mailing that was put out by the Conservative Party in 1982 for our Senate nominee, Florence Sullivan, who was running against Senator Moynihan at the time.

The complaint is that we farmed out our bulk mail permit, our nonprofit permit, impermissibly, to a candidate in violation of the postal regulations, and that this constitutes some kind of a violation as a contribution under the Federal Election Law.

The same complaint was the subject by the same complainants in a case that they brought in the southern district of New York. The complaint was dismissed, and the dismissal of the complaint was affirmed by the Second Circuit Court of Appeals and by the U.S. Supreme Court.

It is basically a difference of opinion about the law. We take the position, and we took it after counseling by our lawyers on these matters, and it is an area of the law that we know—I was a plaintiff in Buckley against Valeo, which was a landmark case under the Federal Election Law; I was also an intervenor in a case, Greenberg against Bolger, in 1980 in the eastern district of New York—and our position is that we did not farm out our permit impermissibly, that if there is anything that a political party is entitled to do and that is a legitimate function of a political party, it is to support its nominees, and that therefore, this was the ongoing activities of the Conservative Party.

There is a difference of opinion about the law, that the complainants did not prevail, and then they went to court with it, and they are now at the Federal Election Commission.

The CHAIRMAN. Have you used your same permit for that same purpose since 1982?

Mr. MAHONEY. Pardon me?

The CHAIRMAN. Have you used your permit for that same purpose since 1982?

Mr. MAHONEY. No; we have not had any statewide campaigns since 1982, Senator, and as long as the matter has been raised, as long as the challenge has been raised to our interpretation of the law, we would intend to refrain from that activity until such time as there has been a ruling on the matter by either the Federal Election Commission or the courts.

The CHAIRMAN. Mr. Mahoney, your litigation experience has been primarily civil in nature, I believe, has it not?

Mr. MAHONEY. That is right, Senator.

The CHAIRMAN. Do you feel that your lack of criminal trial experience will in any way hinder you in the performance of your duties as a circuit court judge?

Mr. MAHONEY. I do not think so, Senator. It is just a question of doing a little more homework and working a little harder when you have a case come before you in an area that is a little unfamiliar to you. But it would not matter, I do not think, whether that is tax or admiralty or whatever; I am sure that anybody who goes on the court has a certain amount of learning to do, and you just have to apply yourself a little bit more when a case of that nature comes before you.

The CHAIRMAN. Mr. Mahoney, as an appellate judge, you will be reviewing decisions of district court judges. What criteria do you intend to use in reviewing these decisions in the trial records?

Mr. MAHONEY. Well, on the facts, of course, I think the Federal Rules of Civil Procedure mandate that you defer to the district court judges, especially when dealing with a matter of the demeanor of witnesses, even more so there than when you are reviewing on documents.

But basically, you defer very largely to them on questions of fact, and only when they are clearly unreasonable or well out-of-bounds would you reverse in that sort of area. And on questions of law, you just have to look at the law very carefully, and I would certainly accord some deference to an opinion or a determination by a lower court judge, but ultimately, you just have to look at the law very carefully and see if what they have done is in accord with it.

The CHAIRMAN. Mr. Mahoney, would you tell the committee what procedures you will follow in determining any potential conflicts of interest and how you intend to resolve them?

Mr. MAHONEY. Yes, Senator. I think the standard under the Code of Judicial Conduct is whether your impartiality could reasonably be questioned, and that is certainly the standard that I think litigants are entitled to.

It is not just a question of whether you feel in your own mind and heart that you can be impartial. It is also a question of appearances, and litigants going away from a courtroom with a feeling that they have received a fair day in court before an impartial tribunal.

So it is not hard to recognize circumstances; in any even cursory review of a file that comes up on appeal, you would know rather immediately whether there was any possibility that your impartiality would be questioned, and whether there is any possible connection with the litigants or the situation. And if there were such a situation, then I would examine it very carefully by the light of

those standards, whether the impartiality on my part could reasonably be questioned.

The CHAIRMAN. Mr. Mahoney, the phrase "judicial activism," is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority. What does the phrase "judicial activism" mean to you?

Mr. MAHONEY. Well, I guess I would give it that kind of definition, Senator. One of the first criteria for a judge having anything before him is the "case or controversy" requirement of the Constitution, and I think it is very important that judges remember that they are not on the bench to set general social policies or to institute sweeping social reforms, but to decide cases or controversies that come before them. And since judges are in the Federal system the only unelected branch of our Government, and since they have the power to declare enactments by the elected branches or actions by the executive branch unconstitutional, I think it is very important that they confine themselves to the role of their proper activity, which is to decide cases or controversies that come before them in accordance with the law as they can best ascertain it and not in accordance with their personal views or predilections.

The CHAIRMAN. Regardless of what party any litigant comes from, do you feel you could give all litigants fair and equal treatment and do justice in your court?

Mr. MAHONEY. I certainly do, Senator, and that would be my very earnest endeavor.

The CHAIRMAN. The distinguished Senator from Illinois, Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Mr. Mahoney, in glancing through your résumé very briefly, I notice that you did a book review on "Open Occupancy and Forced Housing." I am just picking something out at random here but could you recall what you said in that book review?

Mr. MAHONEY. Well, I have re-read it; I would not otherwise. It was 1965. As I recall, I said that the book was a one-sided presentation in the sense that it was a collection of essays by people most of whom were against laws that would compel fairness in housing and that although it was one-sided, it was well-presented, and they made a good case for their point of view—as I recall.

Senator SIMON. The courts have, in fact, enacted through their decisions fair housing laws.

Mr. MAHONEY. Sure.

Senator SIMON. Do you disagree with these decisions? I cannot recall what year the courts acted, so this may have predated—

Mr. MAHONEY. Well, the courts in New York, Senator, I think those laws went back an awfully long time before 1965, if I recall correctly. I think they were maybe as far back as the Dewey years.

Senator SIMON. But did you indicate in that book review any disagreement with the courts in that fundamental thrust?

Mr. MAHONEY. I think that I may have said that they raised the question whether—that the authors raised a legitimate question whether that was the best way at this kind of problem. I would not have any problem, of course, the laws being on the books, enforcing them as a judge, but I think I did make that comment at the end of the book review.

Senator SIMON. I note also your work as general counsel for the National Review.

Mr. MAHONEY. Yes.

Senator SIMON. It happens in a former life, I was a small newspaper publisher. I am very interested in first amendment questions. Do you have any general reflections on the first amendment through your experience?

Mr. MAHONEY. I guess, Senator, that I have, obviously, in the course of all this, been very familiar with the decisions of the court in the area of libel. And in terms of promoting first amendment values, there is probably a lot to be said for the *Sullivan* decision and its progeny.

I guess I have some question whether that was not kind of a departure of *Sullivan* from the law as it had been understood, and whether that is a departure that the Supreme Court should have taken on its own, as distinguished from the question of whether it is sound policy. As somebody who has defended and had obviously something of a bias as a lawyer for a first amendment publisher towards the maximum freedom of speech, I think it is a sound policy. I am just not sure whether it is one that the Supreme Court should have initiated.

Senator SIMON. I do not want to get into the delicate ground of asking how you would rule on anything, because I think that would be improper on my part, but there are some very fundamental first amendment questions that have arisen recently. For example, you may or may not be familiar with the Alton Evening Telegraph case. They did not print an article, actually, that a reporter gathered, but were found guilty of libel because the reporter had been asking questions. The original verdict was for \$9 million. That seems to be a steep price for something they did not print.

Mr. MAHONEY. Yes, I do not know the facts of that intimately, but I have read references to it. It seemed like a pretty outrageous verdict. Did that verdict stand up on appeal?

Senator SIMON. It did, though they finally worked out a compromise. But they ended up paying over \$1 million.

Mr. MAHONEY. And it came very close to putting them out of business, as I recall.

Senator SIMON. Yes.

Mr. MAHONEY. Well, without reading the record, it would be hard to comment on the case, but it is hard to understand—in other words, just on the basis of the reporter going out and asking questions, in terms of the implications of those questions to the individuals whom he asked, even though they did not publish anything, and they said that he had damaged them in the amount of \$9 million?

Senator SIMON. Yes.

Mr. MAHONEY. That is rather astounding.

Senator SIMON. I realize it is very difficult for you to comment.

Can you just tell me briefly the process you went through to be a nominee before us here today?

Mr. MAHONEY. It was a rather startling process to me, Senator. As Chairman of the Conservative Party, as Senator D'Amato testified earlier, I have been very active in his coming to the Senate, and Senator Buckley before him was elected to the Senate on the

Conservative Party line alone in 1970. And my law partner since 1974 has been on the Judicial Advisory Committee for both Senator Buckley and Senator D'Amato. And I had not ever discussed with him a judgeship, and I frankly had not ever thought about a judgeship until I was down here in Washington trying a libel case last fall, last October, and I got a call from Mr. Grover Rees of the Department of Justice. I returned the call—it was about 10 o'clock at night, because we had a trial that ran late and then a deposition—and he asked me to consider the question.

He said he had talked with a few people; he had talked to Senator D'Amato, and he had talked, I believe, to William Buckley in whose magazine's behalf I was trying the libel case, and maybe one or two others. So I think the initiative came from the Washington end rather than the New York end, as well as I am able to ascertain.

Senator McCONNELL. Excuse me a second, Senator Simon.

I just wanted to stop by and congratulate you on your nomination, Mr. Mahoney. I have another meeting, and I just wanted to add my congratulations.

Mr. MAHONEY. Thank you, Senator.

Senator SIMON. Once you were contacted, as it proceeded, and when you talked to people in the Justice Department and elsewhere, did anyone ask you questions that you felt were at all improper?

Mr. MAHONEY. Not at all, Senator. I think the questioning that I went through with the people at the Justice Department, I would describe as designed more to probe how I would think about the law and what general approach I would have to the law and how capable I was at that sort of thing, than to say, "What is your position on this? How would you decide that?" Nobody went into anything like that.

Senator SIMON. Can you give me an example of what kind of a question they would ask?

Mr. MAHONEY. Well, I remember that there was one gentleman—I think it was Mr. Celebrese, if I recall his name correctly—who had been a clerk in the second circuit for Judge Winter and therefore had a particular interest in the second circuit, and he talked to me some about securities law, about just the way the second circuit worked. And pretty much everybody went into libel questions with me, just in much the same manner that you did a little earlier, Senator, because I was down there trying a libel case, and it was in the newspapers a little bit, and it just kind of naturally came up.

I remember there was a particular discussion of Sullivan. I remember a discussion of the securities cases that had come up recently in the second circuit, because some of them were kind of interesting, and I have done a little bit of work in that area.

That is about all the specific recollection I have about discussions of legal areas.

Senator SIMON. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

I want to congratulate you again, Mr. Mahoney, upon your appointment and having the endorsement of both your New York Senators, Senator D'Amato and Senator Moynihan.

Senator SIMON. Excuse me, Mr. Chairman. Could I ask one other question?

The CHAIRMAN. Sure.

Senator SIMON. I notice also that there was a note here of some problems with the FEC. Can you help me on that?

Mr. MAHONEY. Yes, Senator.

The CHAIRMAN. He explained that a few minutes ago, but go ahead and repeat it.

Mr. MAHONEY. Yes, I would like to do it again for Senator Simon.

What happened was this, Senator. In 1982 in the Senatorial race, the candidate of the Conservative Party, Florence Sullivan, we put out a mailing in her behalf, and that mailing was at the special bulk rate, lower than normal third class, that a political party is entitled to. And it was put out while she was running in the Republican primary against two other candidates, Seymour and Seibert. And at the end of the campaign, they sued in the southern district of New York, suing the party and a number of its officers, including me, asserting that that mailing was improper, that we had improperly farmed out our mail permit to a candidate in violation of the Domestic Postal Manual.

They lost; the complaint was dismissed on standing grounds, not on the merits. They lost in the southern district. The dismissal was affirmed by the second circuit, and certiorari was denied by the Supreme Court.

They then brought this proceeding—and that is the one that is now before the Federal Election Commission—saying that we had violated the Postal Manual and that this constitutes in turn an illegal contribution under the Federal Election Contributions Act, or whatever FECA stands for.

We in the first place say that we did not violate the Postal Manual, that if there is anything that is the business of a political party, it is to support its nominees, that this is exactly what a political party's business is all about. And in the second place, we assert that if there is a violation of the Postal Manual, it is a case of first impression, not anything we should have known about in advance, and in any event it is not a violation of the Federal election laws.

I suppose that is a fairly longwinded lawyer's answer. The short answer is that we took counsel from the people who had counseled us for 10 years in these areas, and we acted on counsel's advice. It is a case of first impression. If there is a legal violation—and we are convinced that there is not—it was certainly nothing that was, you know, here is the statute, and it says you should not do this, but we are going to do it anyway. It is a close question, but we think we are right.

Senator SIMON. Thank you.

Thank you, Mr. Chairman.

Mr. MAHONEY. Thank you, Senator.

The CHAIRMAN. Thank you very much, Mr. Mahoney.

I hope you enjoy your service on the bench.

Mr. MAHONEY. Thank you, Senator.

The CHAIRMAN. Mrs. Hackett, if you would have a seat, please. Would you care to introduce any family or friends who are here with you?

TESTIMONY OF BARBARA K. HACKETT, OF MICHIGAN, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN

Mrs. HACKETT. Yes, Mr. Chairman, and distinguished Senators. I would like to introduce to you this afternoon the members of my family who are with us.

My husband, Patrick Hackett, Mr. Chairman; my daughter, Meg, and her husband, David Carrier, who is Captain, JAGS, U.S. Army; my daughters, Elizabeth; Mary Pat; my daughter, Sue, and her son, Robert Delonis; my daughter, Sarah.

They are here this afternoon, coming from all over the country to lend me support this afternoon, Senator.

And in the back, my daughter, Lynn Hackett, and her children, Ruth and Francis Shiman-Hackett.

The CHAIRMAN. Thank you. Have a seat.

How many daughters have you?

Mrs. HACKETT. I have seven, Mr. Chairman.

The CHAIRMAN. And one son?

Mrs. HACKETT. No sons; just one daughter who is not here today, Senator.

The CHAIRMAN. You did not have any boys yourself, but you have had a lot of boys hanging around since then, I guess.

Mrs. HACKETT. We have, Senator, and we are getting some grandsons, so this is fun. [Laughter.]

The CHAIRMAN. Without objection, we will place your résumé in the record.

Mrs. Hackett, in reviewing your file, I noted that from 1973 to 1984, you served as U.S. magistrate for the eastern district of Michigan. I am sure you have noticed an increase in the caseload before the Federal district court over the years, and I wonder what, in your opinion, is needed to speed up the disposition of Federal cases, and would there be more judges and magistrates, or changes in criminal procedures, or what—or working longer hours by the judges?

Mrs. HACKETT. I think it is certainly working the long hours by the judges, but it is my impression, Senator, that it means using your time well. I think the staffs and positions are in place in individual districts. I think certainly in our own, there is a need for additional judges. I know there is a request for magistrates. But basically, it is taking a long, hard look at the talents and resources available and using them.

The CHAIRMAN. Mrs. Hackett, having served approximately 11 years as a U.S. magistrate, can you give the committee any recommendations you might have for improvements in the Federal judicial system?

Mrs. HACKETT. Well, I think it is diligence, Mr. Chairman. I think that again, we have available what we need to make the system work. We do have floods of filings at different times. The judges have a very special opportunity to select for the staffs the

persons that they want in their choice of U.S. magistrates, and I think if they carefully select those persons with broad-based experience, they will be able to draw extensively on that talent to help relieve that docket.

The CHAIRMAN. Mrs. Hackett, do you feel the U.S. magistrates are properly utilized, or should they be given a greater role in the judicial system?

Mrs. HACKETT. On the books, Senator, I think that we have in place everything we need to use the magistrates well. It is left to the individual judges in the various districts to decide which matters they will be referring to the magistrates. So in that, they will have to act wisely.

The CHAIRMAN. Mrs. Hackett, one of the characteristics of judicial activism is said to include "a tendency by the Judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities." Would you give the committee your views on this criticism?

Mrs. HACKETT. The courts, the judiciary, cannot step in every time they believe or determine that the executive and the legislative have failed to act. They have a very special role assigned to them by the Constitution.

I do think the judges are in a very special position to effect the disposition that they want, working through the parties, reminding themselves always that they have before them a single matter and that everything is not a class action, and that many of the matters that persons come before the court seeking relief for, they may be advised that they will have to go to the legislature.

The CHAIRMAN. Under our tripartite system of government, the legislative branch is supposed to make the law, the executive branch to administer the law, and the judicial branch to interpret the law. But in many instances, Federal judges have taken unto themselves trying to execute the law; in some cases, they have practically rewritten laws. I could cite some decisions, I think, to illustrate that but I will not take time now.

At any rate, do you feel that each branch should perform its own functions and not try to take on some other function where it does not have the constitutional authority?

Mrs. HACKETT. That is correct, Senator. The separations of powers are clearly fixed by the Constitution, and the courts must recognize that.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Just glancing through your résumé, I noted that you were reappointed in 1981 for an 8-year term as magistrate, and then you resigned in 1984. Why did you resign?

Mrs. HACKETT. Senator, it became apparent that the constraints in terms of judicial conduct, political activity on magistrates, would make it impossible for me to have the necessary political credentials to be considered for the U.S. district judgeship. It is no secret that that has long been my goal. And I felt like an "Oreo cookie", Senator. When there was a Democratic vacancy, they said I was a Republican; when there was a Republican vacancy, they said I was a Democrat. So I had to come out. We do not register by party, as you know, in Michigan.

Senator SIMON. Under Canon II of the American Bar Association's Code of Professional Responsibility for Lawyers, it says, "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."

Can you tell me what you have done to comply with that Canon?

Mrs. HACKETT. Yes, Senator. When I was in the prosecutor's office, the State Bar of Michigan had no criminal law section. It readily became apparent that to be effective, we needed within that very large bar association a criminal law section. And I was able to found that section and act as its first chairperson. That brought together the prosecution and the defense and eventually evolved a very fine defender's system, brief banks, all kinds of things that would help, and even the identification of persons who would take the indigent cases.

Then, when I was a magistrate, we had an opportunity to pilot one of the first pretrial services units, and I worked very closely and I must say, diligently, with that in putting in place our pretrial services unit in Michigan. The recidivism rate has been so low that it has been an example for many of the courts around the country. That really met the needs, Senator, of many persons who came before the court, possibly more foolish than criminal.

Senator SIMON. In the process of your getting this nomination, did anyone ask you questions that you felt were at all improper?

Mrs. HACKETT. No, Senator.

Senator SIMON. I do not know how this works in Michigan, where you have two Democratic Senators, so I assume one of the Republican Members of Congress is in charge of the nomination process?

Mrs. HACKETT. Congressman Broomfield is our ranking Republican, and he had a selection committee, Senator, selected from the various chairpersons of the bar associations, representatives of the courts, individuals that he felt could identify the credentials of various persons, and qualified persons were urged to apply. There were a large number of applicants. I was able to survive that process, Senator.

Senator SIMON. Fine. I thank you.

First of all, I think, Mr. Chairman, Mrs. Hackett has brought the largest family delegation of any nominee we have had—and you are the first one to bring your own Army with you, too, I think. [Laughter.]

Mrs. HACKETT. I wanted to be prepared. They are very special. We are a closeknit family, and I know I would not be here today without their support, and I do mean that, Senator, truly.

Thank you all.

Senator SIMON. That is great.

Mrs. HACKETT. Thank you.

The CHAIRMAN. Without objection, we will place in the record at the beginning of the hearing a statement by Senator Levin, endorsing Mrs. Hackett, and also, we have a blue slip signed by Senator Riegle, endorsing her, too. So, I congratulate you for having the endorsement of both Senators from your State.

I hope you have a happy tenure of service on the bench.

Mrs. HACKETT. Thank you, Senator.

The CHAIRMAN. If that is all we have today, we will now stand adjourned.

[Whereupon, at 2:38 p.m., the committee was adjourned.]

BIOGRAPHIES

J. DANIEL MAHONEY

NOMINEE, U.S. CIRCUIT JUDGE, SECOND CIRCUIT

Birth: September 7, 1931, Orange, New Jersey.

Legal Residence: New York.

Marital Status: Married to Kathleen O'Doherty Mahoney, 6 children.

Education: 1949-1952—St. Bonaventure University, B.A. degree. 1952-1955—Columbia Law School, LL.B. degree. 1959-1960—New York University, Law School.

Bar: 1960—New York.

Military Service: 1955-1958—United States Coast Guard, Lieutenant.

Experience: 1958-1962—Simpson Tacher & Bartlett, Associate. 1962-1965—Conservative Party of New York, Vice Chairman & Chairman. 1965-1974—Wormser, Koch, Kiely & Alessandrini, Associate (1965), Partner (1966-1974). 1974-present—Windels, Marx, Davies & Ives, Partner.

BARBARA K. HACKETT

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF MICHIGAN

Birth: March 17, 1928, Detroit, Michigan.

Legal Residence: Michigan.

Marital Status: Married to Patrick E. Hackett, 7 daughters.

Education: 1945-1948—University of Detroit, Ph.B. degree. 1948-1950—University of Detroit, Law School, J.D. degree.

Bar: 1951—Michigan.

Experience: 1950-1951—Michigan-Wisconsin Pipeline Company, Law Department, Staff Assistant. 1951-1952—Law Clerk to Hon. Frank Picard, U.S. District Court, Eastern District of Michigan. 1952-1953—McGraw, Sullivan & Ferguson, Associate. 1953-1965—Sole practitioner. 1963-1965—New York Central Railroad Co., Of Counsel on Special Retainer. 1965-1966—Michigan Court of Appeals, Chief Law Clerk. 1967-1972—Assistant Prosecuting Attorney, Wayne County, Michigan. 1972-1973—Sole practitioner. 1973-1984—United States Magistrate, Eastern District of Michigan. 1984-present—Frasco, Hackett & Mills, Of Counsel.

CONFIRMATION HEARING ON DANIEL A. MANION

WEDNESDAY, MARCH 12, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:08 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Mitch McConnell (acting chairman) presiding.

Also present: Senators Simon and Specter.

Staff present: Duke Short, chief investigator.

OPENING STATEMENT OF SENATOR MITCH McCONNELL

Senator McCONNELL. This hearing will come to order. Chairman Thurmond is on the floor of the Senate with regard to the balanced budget amendment.

We have one nominee today, a nominee for U.S. circuit judge for the seventh circuit, Daniel A. Manion, of Indiana, and we have Senator Lugar and Senator Quayle here. I would like to call on them first for any comments they want to make.

STATEMENT OF THE HON. RICHARD LUGAR, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator LUGAR. Thank you very much, Mr. Chairman, Senator Simon. It is a very great privilege and an honor today to introduce to this distinguished committee Daniel A. Manion, a nominee to the U.S. Court of Appeals, Seventh Circuit.

Dan Manion's credentials as a public servant and a private practitioner are remarkable. He received his baccalaureate from Notre Dame University in 1964. Following his graduation from Notre Dame, he served in the U.S. Army in Vietnam and was honorably discharged as a first lieutenant.

He later received his J.D. from Indiana University School of Law in 1973. Mr. Manion served as deputy attorney general for the State of Indiana from 1973 through 1974, and has been in private practice ever since with the South Bend, IN, law firm of Doran, Manion, Boynton, Kamm & Esmont. He was made a partner of the firm in 1978.

In addition, Mr. Manion served one term as Indiana State Senator from the 11th district from 1978 to 1982.

Mr. Chairman, Mr. Manion's professional accomplishments speak for themselves, and it is also important to note that he is highly

spoken of by persons with whom he is associated both inside and outside of his professional status.

It has been my personal privilege to know him as a good friend. He is a person with whom I have worked in Indiana in good government, and it is a very rare privilege to have this chance to introduce him to you, sir, today.

Senator McCONNELL. Thank you, Senator Lugar.

Senator Quayle.

STATEMENT OF THE HON. DAN QUAYLE, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator QUAYLE. Thank you very much, Mr. Chairman and Senator Simon. It is really a personal honor for me to be able to second the nomination of Dan Manion for the U.S. circuit judge for the seventh circuit court.

My senior colleague has aptly described his credentials and his background. I will, for this committee, just add a personal note to this. Dan Manion, my wife Marilyn, and I all attended Indiana University Law School. As a matter of fact, we all graduated at about the same time.

I think my wife would love to be here today to give her comments as far as working with Dan on a professional basis. She was in the attorney general's office, I was in the Governor's office, and he was in the Lieutenant Governor's office as we were struggling through law school.

I can just tell you that we know most nominees only a little bit as we bring them before this committee, but this is really an exceptional case. I have known Dan for a number of years and am really just delighted that the President has decided to place his nomination before this committee.

I know that Senator Simon will have a particular interest in this, since the seventh circuit also covers the neighboring State over there, as we refer to it in Indiana, Illinois.

Senator SIMON. This unnamed State you are referring to. [Laughter.]

Senator QUAYLE. The unnamed State that has a different status when we are back home.

But Dan Manion, Mr. Chairman and Senator Simon, I believe epitomizes what we all like to see in jurisprudence and legal scholastic background. He did not really just get into this type of profession; he was born into it.

His father was a very distinguished constitutional expert, somebody that has written books and knew the Constitution probably as well as anybody. So Dan Manion comes by this vocation naturally. It is not something that he thought about doing and pursued. He was going to do it probably from the day he was born; he was brought up with it.

I think that that kind of an upbringing and those kinds of credentials are something that certainly reflect on the quality of candidate that this committee is going to be looking toward.

So it is really a very high personal honor for me to introduce not only a very good friend of both myself and my wife, but somebody that I think will bring a great deal of credit to this circuit court,

somebody that is steeped in a legal understanding and background of where we ought to be going, and has definite credentials and merits our hopefully unanimous support.

Mr. Chairman, I would like to insert my statement for the record, and again commend Dan Manion to this committee. I think he will be an outstanding judge and I think the President has chosen very well in placing him before the Senate for confirmation.

[The prepared statement follows.]

PREPARED STATEMENT OF SENATOR DAN QUAYLE

Mr. Chairman, I take special pleasure today in praising the President's nomination of Daniel A. Manion of South Bend to serve as a U.S. circuit judge for the Seventh Circuit Court of Appeals. I want to commend the Committee for its expeditious consideration of this vitally important nomination. I urge the Committee to give prompt and unanimous approval to this outstanding nominee.

I have known Dan Manion for over 15 years, having first become acquainted with him at Indiana University School of Law where Dan, my wife, Marilyn, and I were classmates. Already Dan showed a brilliant aptitude for the law and a keen sophistication on public policy issues that would serve him well in his legal career. Dan had previously received his undergraduate degree in political science from Notre Dame and served in the U.S. Army for 2 years, including a tour of duty in Vietnam. I'm convinced that Dan's education was influenced most deeply and beneficially by his upbringing. Dan's father, Clarence E. Manion, the former dean of the Notre Dame Law School, was a perceptive jurist and the founder of the Manion Forum, which produced radio and television commentaries on public and constitutional issues.

Dan Manion and I served together during the administration of Indiana Gov. Edgar Whitcomb in the early 1970's. His experience as the director of industrial development in the Indiana Department of Commerce and as a deputy state attorney general earned him high marks from Indiana's business community, as well as his colleagues in State government. Since 1974, Dan has been in private practice in South Bend, where he is a partner in the firm of Doran, Manion, Boynton, Kamm & Esmont. He also served in the Indiana State Senate representing the 11th District, but did not seek reelection after his term expired in 1982.

I congratulate the President on his nomination of Dan Manion, who possesses a record that illustrates his respect for the traditions of the American legal system and for the principle of constitutional sovereignty. I am confident Dan will serve the Seventh Circuit Court of Appeals with forthrightness, fairness, integrity and dedication. I know from longtime experience that Dan has the personal respect for the law and the personal compassion that are prerequisites for a jurist sitting on the U.S. Court of Appeals.

Mr. Chairman, I urge you and the members of the Judiciary Committee to approve Dan Manion's nomination. I am convinced that Dan Manion will be one of the most influential jurists appointed by this administration. I have every confidence that, as a U.S. circuit judge for the seventh circuit, which includes Indiana, Illinois, and Wisconsin, Dan Manion will both serve the American people fairly and compassionately and fulfill his duty to apply the law rigorously and impartially. The Nation will be well served by prompt approval of this nomination.

Senator McCONNELL. Thank you, Senator Quayle. Your statement will be inserted.

Mr. Manion, would you like to introduce any of your family members who are with you today?

Mr. MANION. I would be happy to, Senator.

Senator McCONNELL. And the Senators can feel free to depart, if you would like to, or stay.

Senator LUGAR. You are on your own.

Mr. MANION. Thank you very much, Senator.

TESTIMONY OF DANIEL A. MANION, OF INDIANA, TO BE U.S.
CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT

Mr. MANION. Thank you, Mr Chairman. I would like to introduce a few people that are here, if that is OK. First of all, my wife, Ann. Next to her on her left is my mother, Mrs. Clarence Manion, and my brother, Chris.

And behind him, I would also like to introduce Mr. and Mrs. Quayle, who are Senator Quayle's parents, and they are from Indiana and I am proud that they are here as well.

Senator McCONNELL. Thank you very much. We are glad to see you all here.

If you would raise your right hand?

Mr. MANION. Do you want me to stand, Senator?

Senator McCONNELL. Yes, why don't you?

Mr. MANION. Thank you.

Senator McCONNELL. Do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MANION. I do.

Senator McCONNELL. Mr. Manion, the chairman has some questions he would like me to propound to you.

From 1973 to 1974, you were the deputy attorney general for the State of Indiana. From 1978 to 1982, you were a member of the Indiana State Senate. With this background, would you give the committee your views on changes in the law being reserved for the legislature, whose members can be altered by the voters if the elected officials fail to reflect the values of society?

Mr. MANION. Yes, Mr. Chairman, I would be happy to address that. As a legislator, I guess I really became aware of the necessity of having an elected process because I was answerable to the public, and in altering the laws of the State I had to represent the people and what they believe. If I did not represent those people, they could toss me out, and I think that is proper.

Obviously, a judge is not in that position, especially in this case. A judge should not legislate, should not create laws if he does not like the laws that are coming before him for his examination.

And I strongly respect the distinction between the legislative process and the judicial process.

Senator McCONNELL. Would you tell the committee what procedures you will follow in determining any potential conflicts of interests and how you would resolve them?

Mr. MANION. Mr. Chairman, as you know, there are very specific statutes set out on that for judges and, of course, I would follow the Federal statute. Also, the Judicial Council has its own procedure and any time a conflict were to arise, and I would even detect it as a possible conflict, I would present it to them for the Council to determine if it is, in fact, a conflict. And, of course, if it were, I would recuse.

Senator McCONNELL. In reviewing your file, I noted that you were a charter member of the Legal Services Program of Northern Indiana. What has been your major contribution to this organization?

Mr. MANION. Mr. Chairman, my purpose in joining that organization was because I believe strongly that lawyers, private practitioners, should volunteer to help people who are really unable to help themselves, who cannot afford their legal defense.

I joined it with the recognition that it should be voluntary, and that we should help people in their everyday problems. They should not be used to take on major causes to change the law.

Using those kind of people for that purpose is wrong, and therefore I volunteered to help the individuals. I have not done that much. I have worked on several cases that they have presented to me, but I think that is part of the pro bono effort in which a private practitioner should participate.

Senator McCONNELL. Would you give us your own perspective on the recent trend in the Supreme Court toward stricter requirements of standing?

Mr. MANION. Yes, Mr. Chairman. I think the issue is really the so-called taxpayer suit. For example, if a taxpayer were to bring an action to challenge an appropriation that taxpayer disagrees with, I think that taxpayer's standing is minimal, and he should not be allowed to inject himself into the Federal courts and clog up the system simply because he is a taxpayer.

The Federal courts have limited jurisdiction. That jurisdiction should be confined to those people who have a grievance or some other type of issue that is properly before the court, and I do not think it should be expanded to some trivial issue where they are not the proper party in interest.

Senator McCONNELL. Thank you.

Senator Simon.

Senator SIMON. Yes, thank you very much.

Mr. Manion, we welcome you here. Let me particularly acknowledge the presence of Mr. and Mrs. Quayle. It is not very often we have the parents of one of our colleagues in a hearing, and we are particularly pleased to have you here.

Mr. Manion, the Chicago Council of Lawyers, which represents about 1,000 of the lawyers in the city of Chicago advises me that you did not send them a copy of your questionnaire; you have not filled out their questionnaire; nor you did not send a list of lawyers for them to interview, and you did not make yourself available for an interview.

Is this accurate?

Mr. MANION. No, it is not accurate, Senator. No. 1, the questionnaire that they were referring to is the confidential questionnaire required by the ABA and, of course, I did fill that out.

The chairwoman of the seventh circuit, the representative for the ABA, called me and said that it is confidential, and it is not their practice to pass out that form to anyone. She also happened to be a member of the Chicago Council of Lawyers.

And I said, "well, it should remain confidential; I do not know what they are going to do with it. I assume they will make copies." So that is why they did not get the form. Nobody other than the ABA got the form.

It is for the ABA's private, confidential use and, as I understand it, the ABA does not share it with the Senate. I think it is strictly for the ABA's use, and that is where it should remain.

The second issue: They wrote to me shortly after my nomination was mentioned by the Justice Department. I wrote to them and said I would be happy to meet with them any time that they suggested.

I heard from the person—I think his name was Mr. Geraghty. He called me last week; he wanted to meet with me this week. I told him I had a trial today, which, in fact, was true. We settled it last Friday, the same day I was notified of this hearing today.

He was going to call me the 14th. I did not know my hearing was today when I talked to him. As far as a list, I have dictated a complete list. My secretary was out of the office last Thursday and Friday and did not get a chance to type it.

When he first called me, I asked why he didn't call me sooner. He had the letter for 4 months. He said, it was his fault; he should have done it.

As far as my unwillingness to meet with them, I had not talked to him. I have no idea what issues he wanted to cover. I would have been happy to have met with him had he contacted me on a timely basis.

Senator SIMON. At some point before your nomination gets to the full committee, you, then, would be willing to meet with them?

Mr. MANION. I have no problem with that; I never did. I would be happy to meet with them. I discussed some issues on the phone, as I recall, but for the most part he wanted to come over with, I believe, two or three other members, and we had not even talked about a date. He had some personal time conflicts.

He was teaching so he had his own time problems.

Senator SIMON. What does the establishment clause in the Constitution mean to you?

Mr. MANION. Well, it means what the Constitution says, no State shall establish a religion, and I certainly adhere to that; I have no problem with that provision in the Constitution.

Senator SIMON. We have received a letter from the group People for the American Way—you may or may not have seen the letter that they sent out—concerned about the bill that you cosponsored as a member of the State senate: the creationism bill.

Do you want to comment on how that fits into the establishment clause and any thoughts you have on that?

Mr. MANION. Certainly, Senator. As a former State senator, you would understand that usually these kinds of issues come before you through some constituency, and that is exactly what happened with me.

I heard from a number of people who were complaining about the teaching in biology. At some point, I was on the senate education committee and it may have been while I served there; I am not positive when that bill came up.

But their question was, Why do they teach only evolution? These people thought evolution was a religion. I said, well, evolution is supposed to be a scientific theory and that is the way it is supposed to be taught.

And they said, "then why not teach creation alongside of evolution as a scientific theory?" And I thought that was an intriguing idea. Of course I said that we cannot promote religion, even though many things in our Constitution, in our Declaration of Independ-

ence and our own coins refer to God and acknowledge God. Because of certain rulings by the Supreme Court, there are limitations on any kind of promotion of God in the schools.

Personally, I think that is unfortunate, but that is the law. But by presenting this bill before the senate, which we did and had excellent testimony from both sides. Witnesses talked about creation science. It was a fascinating discussion, one that I really think would have benefited the kids in the high schools. They would have been able to discuss evolution versus creation without the intervention of a God.

And they would debate the evolutionary process and explore the fact that there are no interim species. What happens when you traverse from one to the next? Why are there not fossils in the interim?

I had never heard that discussion before, but I thought it was really an interesting fact that should have been brought out. I think your letter refers to a mandate. As I recall, the bill was amended so that it was discretionary with the school boards to at least teach these theories side by side so that both sides would be considered rather than just evolution.

I want to add that this bill was a legislative prerogative that I exercised. There is a big difference between the duties of a legislator on behalf of his constituency, and the duties of a judge. It is not my duty as a judge to determine whether or not I think that law or statute or regulation is proper.

As a judge I must determine whether the law is constitutional, and, second, if it is properly applied with the intent of the legislature. I know that there is an Arkansas case that held that a law in Arkansas—and I have no idea of its similarity to the one that we had in Indiana—did not meet the standards of the first amendment.

I accept that; I do not know exactly what the law was. But I distinguish between my judicial duties and my legislative duties.

Senator SIMON. We received another communication indicating that your background in the area of civil rights simply was almost nonexistent. Whether that is a fair appraisal or not, I do not know, but can you give me anything in your background to indicate that, as a judge, you would be fair to everyone, regardless of what their background might be?

Mr. MANION. Whoever is raising this question never brought it to me. I have not heard this. Whatever the civil rights issue is, it is true, I have handled very few civil rights cases. I think I represented a woman in a sex discrimination case before the Human Rights Commission, and I believe I represented a man in an age discrimination case in Federal court.

But that is under Federal statutes and I never made a big deal out of it. In any case, if I had these issues before me, I would look at them in light of the law and the precedent.

I really do not know where this criticism came from. I suppose it is because I have not been a legal activist, and maybe because I have not handled civil rights class action cases. I will admit that is true.

I am a civil litigator. Basically, I do commercial defense and I do personal injury, plaintiff. That is the area of my litigation. I have a

general practice. I represent small corporations and businesses; I represent a lot of people.

I guess the only thing I can tell you is if you want to contact any of those clients and ask how I treat them and how fair I am, I think they would endorse me.

Senator SIMON. My colleague, Senator McConnell, mentioned your service on the Merit Commission on Federal Judicial Appointments. What kind of standards are you looking for as a member of that Commission?

Mr. MANION. Well, I am not a member of that anymore, Senator, but I was asked by Senator Quayle to serve on that Commission long before this ever came up, obviously. Our objective was to examine detailed forms from each applicant. I remember when I first saw these forms, I said, "one thing I am never going to do is try to be a judge," after having looked at how much information they had to provide.

But there were about 45 or 50 applicants and we reviewed them to determine from our standpoint their level of competency and experience, and the type of work that the various judges had done. This screening process was for the trial bench, which was an important distinction.

We looked at the different people who had been trial judges, what their background was, and ultimately our objective was to select three people from whom the Senators and the President and the Justice Department, however they went, would choose the ultimate nominee. That final choice happened to be Judge Miller from South Bend. He was the ultimate nominee of that process that I participated in.

But we looked for all of those things that are on the form, similar to the one that I presented to the Senate. We examined the qualifications and background and the reasons why a person wanted to be judge, that kind of thing.

It was a fairly comprehensive process. We had two hearings. After the initial meeting, we selected nine people who later appeared for personal interviews.

And then, of course, there were other checks going on. I believe the State police or the FBI did a background check and that sort of thing.

Senator SIMON. Were there any qualities particularly that you looked for?

Mr. MANION. The qualities that I looked for were the type of cases that each had handled and the reputation that each judge had in dealing with the cases and in dealing with the lawyers that came before them; their judicial temperament, their willingness to work, and the type of work that they produced.

And Judge Miller, who was the person that was selected, had an excellent background. I personally knew him; I knew his reputation with the lawyers in our community.

Another one of the three selectees was a Federal magistrate named Judge Lee, whose background was also very familiar with. He was an excellent trial judge. He let the lawyers try their case; he did not cause any bias.

The third was a Judge Embry, with whom I was less familiar. I knew of him, and he had those same qualities. For a trial judge, I

look for their ability to move their calendar and their judicial temperament during a trial, how they deal with the lawyers, the witnesses, and how they let the lawyers try their case.

Senator SIMON. As my colleagues on this committee know, I have expressed concern about just in the quality of nominations we are receiving. And one of the concerns I have is, frankly, we are getting too many who are being found by a majority of the bar association to be qualified, but not qualified by a minority.

You happen to fit into a category where a minority of the bar association has said that you are not qualified to be a judge. Do you have any understanding at all why—and I was not given the reason why a minority found you not qualified—do you have any sense of why they may find you not qualified?

Mr. MANION. I can make several observations on that, Senator. I think, first of all, one of the things we did not do when we were going through our judicial selection process was to consult with the ABA.

The American Bar Association is an interest group, and you as a former State senator and more so now—are familiar with what the interest groups do. In the city of South Bend, for example, there may be two or three people who are active in the American Bar Association. All the rest of them just pay their dues.

I realize there is a political atmosphere within the American Bar Association. I guess they have a certain ideal of what a judge should be. Usually it is someone from a big firm, a firm that does major litigation, that does a lot of pro bono litigation or legislation, and participates at a level that the small practitioner and small-town practitioner just does not identify with.

I am from a relatively small town, and I am a small-firm practitioner. I think that weighed against me. This is the type of litigation I do. I represent a lot of people, small cases, personal problems, little things.

The firms that are representative of the ABA at that level represent major commercial litigation. I do not know if they ever see their clients, but I think they have a different perspective at that level, and I think that is critical in their analysis.

I think another reason is that, frankly, I am not a member of the ABA. I personally chose not to join the ABA because if I am not going to be able to be active in an organization, I do not want to pay dues and be a token member.

I know of many people that pay their dues. Then I see things like the litigation section of the ABA going over to the Soviet Union to negotiate and commiserate with the lawyers in the Soviet Union about justice. They spend a lot of money on that sort of thing.

I know Senator DeConcini, among others on this committee, criticized that very strongly, and I would agree. If I cannot participate and if I do not have the time to participate and do something about where the money goes, then I do not choose to be a member. I think that may have had some influence on the evaluation as well. Frankly, they never told me anybody said I was unqualified.

Senator SIMON. We do not get that information.

Mr. MANION. I only interviewed with 1 person, and I think 14 vote. I guess they vote on whatever that one person says. I do not know how they could vote differently, but that is OK.

Senator SIMON. I might just add you are from South Bend, IN. For someone from rural southern Illinois, South Bend, IN, is a great big city, not a small town.

Mr. MANION. I knew you were going to say that. [Laughter.]

Senator SIMON. I thank you, Mr. Manion.

Mr. MANION. Thank you, Senator.

Senator SIMON. Thank you, Mr. Chairman.

Senator McCONNELL. I think that concludes our hearing. We appreciate your coming.

Mr. MANION. Thank you very much, Senator.

[Whereupon, at 2:33 p.m., the committee was adjourned.]

BIOGRAPHY

DANIEL A. MANION

NOMINEE, U.S. CIRCUIT JUDGE, SEVENTH CIRCUIT

Birth: February 1, 1942, South Bend, Indiana.

Legal Residence: Indiana.

Marital Status: Married. Ann Murphy Manion.

Education: 1960-1964—University of Notre Dame, A.B. degree. 1969-1973—Indiana University, School of Law, J.D. degree.

Bar: 1973—Indiana.

Military Service: 1965-1966—U.S. Army.

Experience: 1973—Office of the Attorney General, State of Indiana, Clerk. 1973-1974—Deputy Attorney General, State of Indiana. 1974-1978—Doran, Manion, Boynton & Kamm, Associate. 1978-present—Doran, Manion, Boynton, Kamm & Esmont, Partner. 1978-1982—State Senator, Indiana State Senate.

CONFIRMATION HEARING ON KENNETH L. RYSKAMP

WEDNESDAY, APRIL 9, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to call, at 2:05 p.m. in room 226 of the Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators McConnell and Simon.

Staff present: Duke Short, chief investigator; Reginald C. Govan, minority counsel/investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order. Senator Chiles, I understand, will be coming; Senator Hawkins will be unable to be here—she's had an operation.

We are holding a hearing on Kenneth L. Ryskamp to be U.S. district judge for the southern district of Florida.

You might stand up and be sworn.

[Nominee stands.]

The CHAIRMAN. Do you swear that the testimony that you will give us here will be the truth, the whole truth, and nothing but the truth, so help you God.

Mr. RYSKAMP. I do.

The CHAIRMAN. Have a seat. Without objection we will place your résumé in the record.

Do you have any family with you that you would like to introduce to the committee?

Mr. RYSKAMP. Yes, Senator, I do.

[The nominee introduces his family and friends.]

The CHAIRMAN. Senator Chiles has come in, and so we will hear from him.

Senator Chiles, we are very pleased to have you with us, and you may go ahead.

STATEMENT OF HON. LAWTON CHILES, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator CHILES. Thank you, Mr. Chairman, I look forward to helping to present today a fellow Floridian who has been nominated for a position as a U.S. district judge for the southern district of Florida.

And I urge the committee to judge favorably on Mr. Ryskamp's credentials and judicial temperament, and send his name to the full Senate for confirmation.

I think he is a fine candidate for this appointment. I have heard from many lawyers in Florida, especially in south Florida, speaking on his high qualifications, and I think he is a man who is eminently qualified for the job. He earned his law degree from the University of Miami in 1956 and has been practicing since that time. He was a clerk for Judge Horton in the district court of appeals right after law school and went into private practice in 1961.

He has been involved in a lot of important cases in Florida. He has done a lot of pro bono work, and has earned high marks from the ABA and his colleagues.

I feel that he is a person with the proper judicial temperament. And, Mr. Chairman, I see him as being a good addition to the judges in south Florida. There is a heck of a caseload down there, as you well know. I think there is probably a heavier caseload out of south Florida than there is in any other district in the country, any division in the country.

We need competent judges down there. We also need judges who are not lazy, and who are willing to work.

And I think Mr. Ryskamp's career very much points to a man that perhaps borders on being a workaholic, and that is something that will be an addition to the division down there. I think that, with the high marks that he has made as a lawyer, he is an outstanding candidate for this job.

I know Senator Hawkins wishes she could be here today, and we trust that she is doing well. But I think this is an excellent selection.

The CHAIRMAN. Thank you very much, Senator Chiles. We appreciate your presence.

And the fact that Senator Hawkins has recommended you and Senator Chiles has endorsed you—you have both the Florida Senators for you after the President has sent your nomination down—and so I would anticipate no trouble your being approved.

Mr. RYSKAMP. I would like to thank Senator Chiles for coming, and I appreciate your remarks.

The CHAIRMAN. At this point I wish to place a statement by Senator Hawkins in the record.

[Statement follows:]

PREPARED STATEMENT OF SENATOR PAULA HAWKINS

Mr. Chairman, it is my pleasure to introduce to the Senate Judiciary Committee today Kenneth Ryskamp, who has been nominated by President Reagan to serve as United States District Judge for the Southern District of Florida. Kenneth Ryskamp will bring to this judicial post an excellent combination of personal qualities, educational background and legal expertise.

Kenneth Ryskamp approaches this judicial post prepared to address the vital issues confronting our country today. His extensive legal clients include liability insurance companies, the Federal Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, an educational institution, and title insurance companies. Time and again, he has participated in litigation defending our Constitutional rights. With his specialization in the areas of appellate practice, commercial litigation, railroad law, and real estate, he knows Florida's needs and problems as they relate to Federal law.

Kenneth will serve the Southern District of Florida, a most unique district. This district has the heaviest judicial caseload in the country, and experience such as Kenneth's is vital to adequately serving the people of the area. Having practiced law for most of his career in Florida, he knows the complexities of those issues unique to Florida such as our delicate environment and our extremely high growth as a state. Florida tends to attract perpetrators of fraud, such as the recent GIC Securities which declared bankruptcy and left thousands of senior citizens without a penny of their invested savings. Kenneth's past experience in these and other areas has prepared him for a judicial appointment.

Kenneth has built a reputation in the Miami area and beyond as an outstanding lawyer. He and his wife, Karyl Sonja Honsey, moved to Miami from Michigan in 1953, and they have contributed to the Miami community since that time. I am pleased to recommend Kenneth to you, Mr. Chairman. He will be a tremendous asset to our Federal judiciary.

The CHAIRMAN. Thank you very much. Mr. Ryskamp, in reviewing your file, I noted that your litigation experience has been primarily civil in nature, is that right?

TESTIMONY OF KENNETH L. RYSKAMP, OF FLORIDA, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA

Mr. RYSKAMP. That's correct.

The CHAIRMAN. You specialized in appellate practice, commercial litigation, with some insurance defense, railroad law, real estate, and corporate work.

Do you think your lack of criminal trial experience will in any way hinder you in the performance of your duties as a district court judge?

Mr. RYSKAMP. No, Senator, I don't believe it will. I believe litigation is primarily litigation. I think the advantage of my background is that I have had such a diversity of litigation. When I began my career, I started with the District Court of Appeal, the Third District of Florida, where we reviewed criminal cases, and I have tried some criminal cases. I have continued to handle some criminal appeals.

The Federal Judicial Center has supplied us with some very invaluable works regarding criminal practice, sentencing, and I have been diligent to read those matters. The judges of the southern district have assured me that I will pick up very quickly on the different nuances of criminal practice.

The CHAIRMAN. Mr. Ryskamp, approximately two-thirds of your court appearances, I believe, have been in State courts of record.

Do you believe litigants in State courts receive the same level of fairness, due process, and quality of justice as your litigants in Federal courts, and would you explain your answer?

Mr. RYSKAMP. I think they receive the same degree of fairness. I am not sure that the quality of justice in the State court is quite as high as the Federal court. My experience is that if I had my choice I would rather be in Federal court.

Now, I do not fault the State court judges. Over half of the southern district of Florida are former State circuit court judges. They do not have the benefit of law clerks, as Federal judges do; they do not get a memorandum with each motion. And therefore they are somewhat limited in the disposition of cases.

I think that had they been subject to the same nominating and confirmation procedures that are held for Federal judges, we would see an elevated standard. I say this in no way to demean our State

court judiciary—we have some excellent judges there. But the Federal system provides further safeguards which the State system does not.

The CHAIRMAN. Mr. Ryskamp, in response to a portion of the committee questionnaire in citing judicial activism, I believe you stated "Prior judicial decisions should be given respect as precedent insofar as they have correctly interpreted the law."

What do you feel would be your duty as a Federal judge if confronted with a case in which one of the precedents of your court clearly conflicted with the Constitution as you interpret it?

Mr. RYSKAMP. Well, I have a very high regard for precedent. I believe that we all stand on the shoulders of some of the legal giants that have gone before us, and when we come to important principles of law we should not reinvent the wheel but look to the guidance that others have given us in prior decisions.

However, the law is dynamic and not static, and, because there is a decision, it does not mean that that should control. I think if that situation were to arise, the first thing I would do is examine my own beliefs and interpretations regarding what the Constitution says, to make sure it is not a personal idiosyncrasy of myself. After determining that I have properly interpreted the Constitution, I would look to the decision to see if it stands the test of time, whether this is a well-established principle or whether this is a fairly recent innovation and has not yet met the challenge of other opinions.

So I think I would look very carefully in that regard.

If I became convinced that a decision had been erroneously decided, I would not hesitate to explain my reasons for submitting a contrary opinion and pointing out the obvious conflict, and probably certifying it to an appellate court so that the matter might be resolved.

If we only accepted precedents over the years, we would not see some of the changes that we have over the years, and I believe that each judge, regardless of whether it's a district, circuit, or Supreme Court level, should speak his own conscience and convictions with regard to interpreting the Constitution.

The CHAIRMAN. The Supreme Court even has reversed itself over the years in some decisions.

Mr. RYSKAMP. That's correct. If it weren't for that, we would be still looking at the *Dred Scott* decision and *Plessy v. Ferguson*, and many of those cases which are no longer credible.

The CHAIRMAN. Mr. Ryskamp, you also informed the committee I believe that the separation of powers between the legislative, executive, and judicial branches of the Government should be maintained.

How does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking, and what criteria would you consider in determining whether or not a decision was the type that should be made by a judge as opposed to an elected legislative body?

Mr. RYSKAMP. Well, your question is how to draw the line—I suppose very carefully. The legislature is charged with enacting laws which deal with substantive matters; the judiciary is charged with construing those laws to determine if they are valid, and also adopting procedural rules.

Now, there are occasions, such as an interpretation of the Constitution dealing with procedural due process, where there might have been legislative inaction, where these things come into tension. If someone is entitled to due process, or equal protection under the law, and the legislature has not acted to implement that, then of course that puts the courts in tension with the legislature.

I would prefer that the legislature resolve those problems. But we have seen situations in the past, such as legislative reapportionment, for example, and equal access to schools, which have involved the courts. Now, I think that the courts should be very chary about going into those areas, but the charge given to a judge is to properly construe the Constitution—and, unfortunately, there is not a clear line between these powers.

The CHAIRMAN. Some judges have been accused of judicial activism. Their job is to interpret the law, not make the law, don't you think?

Mr. RYSKAMP. I certainly agree with that, and I do not consider that I would be a judicial activist. I would look for the guidance from the legislature in establishing basic substantive law.

The CHAIRMAN. Mr. Ryskamp, article III, section 1, of the Constitution invests in the Congress plenary power to ordain and establish such inferior Federal courts as it sees fit.

To what extent is it a function of that direct power that Congress is equally empowered to limit the jurisdiction of lower Federal courts over various classes of cases and controversies?

Mr. RYSKAMP. Well, the Congress could certainly, as a suggestion, change the law with regard to diversity of citizenship. Now, if the jurisdictional limit was raised from 10,000 to, say, 50,000 or 100,000, obviously Congress would be affecting the jurisdiction of the Federal court. Obviously any legislation which is enacted by Congress affects the jurisdiction of the court.

I'm not exactly sure that's the answer you are looking for. I think that since *Marbury v. Madison*, it's been clear that the courts have the power to determine whether legislation is constitutional. Now, that's very rare in our country; there are not many countries that have delegated to their judiciary the power to review legislation to determine if it's constitutional.

There is no question but that under that article the Congress could limit the jurisdiction of the U.S. district courts, as well as other courts.

The CHAIRMAN. I think those are all the questions that I have. Do you have anything else you would like to say?

Mr. RYSKAMP. It's been a rare privilege for me to meet with the committee and to undergo this process, and I appreciate the consideration I have received from many of the staff.

The CHAIRMAN. The Democrats are generally represented here by Senator Simon. Let me see if his staff member is here.

[The chairman consults with staff.]

The CHAIRMAN. Senator Simon may have some questions he will want to ask you. There is a vote on now. He will probably be here in about 15 minutes, after this vote is over. If you wouldn't mind waiting till he comes.

Mr. RYSKAMP. I will be glad to.

The CHAIRMAN. That's all the questions I have. Again, I congratulate you on your appointment, and I want to say that I regret

that Mrs. Hawkins couldn't be here. Senator Hawkins is a very able Senator, she's doing a fine job, and I am sure that she would be here if she possibly could.

So we will take a recess now until Senator Simon can get here after he votes.

[Brief recess.]

Senator McCONNELL [presiding]. Senator Simon has a few questions and he is not too far behind me down the hall. I just wanted to stop by and congratulate you on your nomination. I really have no questions. And I think when Senator Simon is through, that will wrap it up.

So if you will wait just a few moments longer; he should be here shortly.

[Brief recess.]

Senator SIMON [presiding]. First of all, my apologies for keeping you waiting here, Mr. Ryskamp.

The Bar Association Canon of Ethics requires that

Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged.

Can you tell me what you may have done in your experience to live up to that?

Mr. RYSKAMP. Yes, I've probably though not always through a formal structure, handled a great number of cases for clients who could not afford to pay for these services. In our firm we have encouraged the younger members to also devote a certain amount of time to legal services type work.

My own particular interest has been in many church-related institutions, and invariably, when asked to serve on a board, you end up providing those services at no charge.

So, yes, I think that, when I look over the years at the number of uncompensated-for hours I have donated—it's considerable.

Senator SIMON. One of the suggestions of the bar association is that it is inappropriate for a judge to hold membership in any organization that discriminates in any way. I notice that among the organizations you are affiliated with is the University Club.

Is this a club that would fall into that category?

Mr. RYSKAMP. I indicated to the American Bar that if they requested a resignation, I certainly was willing to do so. I think it's unfortunate sometimes that people who are working for change get removed from the scene, but I understand the circumstances. I have never been on the admissions committee and I don't know what criteria they use. All you can do is look at what you see around you. And I assume it would be in that category.

I would also add that about four or five of the sitting Federal judges in the southern district were from the club. They are no longer members. And I assumed that resignation would be a condition of confirmation.

Senator SIMON. So that you would be willing to resign?

Mr. RYSKAMP. Yes, I would.

Senator SIMON. First of all, I'm pleased that the bar association finds you well-qualified. As other members of the committee can tell you, I have had some criticism that we haven't had enough nominees in that category. And I commend you for that.

Mr. RYSKAMP. Thank you.

Senator SIMON. In the process of being cleared for this, did anyone ask you questions that you felt were at all inappropriate?

Mr. RYSKAMP. No, no questions have been asked of me to indicate how I might decide a case that might come before me or any personal opinions or philosophy of the law that I have. And I was very pleased with the progress of these discussions, and no such questions were asked.

Senator SIMON. What was the general nature of the questions that were asked you?

Mr. RYSKAMP. Basically they wanted to know my background, cases that I have handled. They never once strayed from what I considered perfectly proper questions. You may have seen from my résumé that I have done environmental work. When I talked with somebody in the Justice Department who did environmental work or was concerned with environmental matters, I gave them some of my views with regard to the good things they were doing and some of the bad things they were doing. And when I talked with somebody from Civil Rights, I told them exactly what my involvement in civil rights cases was, and the good and the bad that I thought was being done. They didn't ask for that; that was being volunteered.

Senator SIMON. I have no further questions for you, Mr. Ryskamp. We wish you the very best.

And the hearing stands adjourned.

[The hearing adjourned at 2:47 p.m.]

BIOGRAPHY

KENNETH L. RYSKAMP

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF FLORIDA

Birth: August 10, 1932, Grand Rapids, MI.

Legal Residence: Florida.

Marital Status: Married. Karyl Sonja Honsey Ryskamp, one child.

Education: 1950-1953—Calvin College, A.B. degree (1955). 1953-1956—University of Miami, Law School, J.D. degree.

Bar: 1956—Florida. 1957—Michigan.

Experience: 1957-1959—Clerk, Honorable Mallory H. Horton, District Court of Appeal, Third District. 1959-1961—Sole practitioner. 1961-1984—Goodwin, Ryskamp, Welcher & Carrier, P.A. (formerly Bolles & Prunty), Partner. 1984-present—Squire, Sanders & Dempsey, Partner.



CONFIRMATION HEARING ON JAMES LARRY EDMONDSON

WEDNESDAY, APRIL 16, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:10 p.m., in room SD-226, Dirksen Senate Office Building, Senator Mitch McConnell (acting chairman) presiding.

Also present: Senator Simon.

OPENING STATEMENT OF SENATOR MITCH McCONNELL

Senator McCONNELL. The hearing will come to order.

Senator Mattingly is here on behalf of Mr. Edmondson who has been nominated by the President to be U.S. circuit judge for the 11th circuit. Senator Mattingly.

STATEMENT OF HON. MACK MATTINGLY, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator MATTINGLY. Thank you, Mr. Chairman.

It is a pleasure for me to introduce to the Judiciary Committee Larry Edmondson, the President's nominee for U.S. circuit judge for the 11th circuit. Larry was born in Jasper, GA, and was educated in the public schools of Pickens and Cherokee Counties. He was awarded a degree in political science from Emory University in 1968 and received his legal education at the University of Georgia and graduated in 1971.

While in law school, he was on the dean's list, the 1970 National Moot Court Team, and he was chosen for the Order of Barristers and the American Jurisprudence awards. And in 1980, Larry was one of just 15 professionals selected nationwide for a fellowship to the University of Kansas to study, and I quote, the individual values and professional responsibilities.

Larry served 2 years as a law clerk to the chief U.S. district judge for the Northern District of Georgia, Sidney O. Smith. He has since practiced law in Lawrenceville, GA, Mr. Chairman, and it is the fastest growing county in the United States.

In addition to his general practice of law, Larry's firm represents the Gwinnett County school system and the cities of Snellville and Sugar Hill, and Larry at one time was also an instructor in trial practice for 9 years at the University of Georgia.

The respect he has earned from his colleagues is illustrated by his election in 1982 to the board of governors of the State bar of

Georgia, and he has also served as president of the Gwinnett County Bar Association from 1980 to 1981.

Larry has been active in his profession and in his community. He is the type of judge that is needed on the Federal bench, and although he does not have prior experience as a judge, I believe that it is healthy there be some appointments to the circuit court made directly from the ranks of practicing attorneys.

Larry is a fine attorney, and he is going to make an excellent judge. He has got the intellectual capacity, the professional qualifications, and a commitment to upholding our laws and our Constitution.

Once the committee has completed its investigation and hearing, I am certain Larry Edmondson will receive a speedy confirmation. In addition, Mr. Chairman, I would like to say that the senior Senator from Georgia cannot be here this afternoon, but I have a statement from Senator Sam Nunn to the committee recommending Mr. Larry Edmondson for this position.

Senator McCONNELL. We will include it in the record.

Senator MATTINGLY. Thank you, Mr. Chairman.

[Prepared statement of Senator Nunn follows:]

STATEMENT OF SENATOR SAM NUNN, SENATE JUDICIARY COMMITTEE, APRIL 16, 1986—
CONFIRMATION HEARING OF J. LARRY EDMONDSON, 11TH CIRCUIT COURT OF APPEALS

Mr. Chairman, I join with Senator Mattingly today in introducing Larry Edmondson to the Senate Judiciary Committee as President Reagan's nominee for the current vacancy on the 11th Circuit Court of Appeals. Although I have not been personally acquainted with Larry, I have known his reputation in Georgia as a hard working and intelligent attorney of the highest ethical and moral character. Larry has practiced law in Gwinnett County, the fastest growing county in Georgia and in the nation, since 1973. Prior to that time he served as a clerk to former Federal District Judge Sidney O. Smith, one of the most highly respected judges to sit on the federal bench in Georgia in many years.

Larry Edmondson grew up in the north Georgia mountains of Pickens and Cherokee counties and received his undergraduate degree from my alma mater Emory University. He then received his law degree from the University of Georgia School of Law where he was very active in the moot court program. Since becoming a member of the bar he has represented a variety of clients including the Gwinnett County School Board and has earned a reputation as a successful and accomplished lawyer. For several years he also was an instructor in trial practice at the University of Georgia School of Law. He is a past president of the Gwinnett County Bar Association and has served in a variety of leadership roles in the State Bar of Georgia including serving as a member of the Board of Governors of the State Bar since 1982. Larry has been an active speaker and writer in continuing legal education programs. He is a dedicated civic leader in Gwinnett County.

I am happy to have this opportunity to join with Senator Mattingly in introducing Larry Edmondson to you today.

Senator MATTINGLY. If you have any questions, I will be happy to answer them. If not, let us have a speedy confirmation.

Senator McCONNELL. We would like to do that, Senator Mattingly.

Senator MATTINGLY. Thank you, sir.

Senator McCONNELL. Mr. Edmondson, do you have any family members here you would like to introduce?

Mr. EDMONDSON. Yes, sir, I do.

This is my wife's uncle, Mr. Dettelbach, who is a lawyer in Atlanta; my wife, Eugenia; Victoria Sweeney, who is a lawyer in the law firm with me; and Fred Heller, who is a lawyer in Atlanta.

Senator McCONNELL. If you would raise your right hand, do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. EDMONDSON. I do.

Senator McCONNELL. Have a seat.

Chairman Thurmond had to chair an Armed Services Committee hearing, and that is why he is not here. He has left with me several questions which I would like to propound to you on his behalf.

**TESTIMONY OF JAMES LARRY EDMONDSON, OF GEORGIA,
NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE 11TH CIRCUIT**

Senator McCONNELL. You have been a practicing attorney since 1973; now you have been nominated to be U.S. circuit judge for the 11th circuit.

What do you feel would be the most rewarding aspect of serving in this position, and how do you feel personally about your own capacity at this point in your career to carry out the very significant power and responsibility of a circuit court judge?

Mr. EDMONDSON. I think the most rewarding aspect of serving on the circuit court of appeals will be the opportunity to work with the laws themselves, the analytical part of the law, the studying of the law, itself, and the reading and writing of it, has always been to me the single most attractive part of being involved in the legal process.

It seems to me that the appellate judgeship is the one area in which that aspect of dealing with the law is most emphasized.

In respect to my capabilities to serve at this point, I think that several factors combine to make the point that I would contend that I would be able to serve well. In college, of course, I was a political science major and was a member of the National Political Science Honorary Society. I had an interest in government even at that time. I had the opportunity to work in Washington briefly between college and law school for a Member of Congress, Mr. Landrum from the ninth district of Georgia.

In law school, itself, my primary activity was related to moot court work, which probably all of you know, involves appellate advocacy. During the time I was in law school, the school selected me to be a member of their National Moot Court Team and their International Law Moot Court Team to represent the law school in competitions.

The faculty also selected me to be a member of the National Moot Court Honorary Society, the Order of the Barristers, for my work in appellate advocacy as a student.

From law school, I went on to become a law clerk for the chief U.S. district judge in Atlanta. I regard that opportunity as having been an extraordinarily fine one for a young lawyer. It gave me 2 years of total immersion in the Federal judicial system. That particular district court at that particular time was a district court with one of the highest case loads in the Nation. We saw a lot of cases, a lot of different kinds of cases. Atlanta is a center of the South, and a lot of important cases were brought there for that reason.

In my private law practice, my first 9 years were primarily with a law firm that was engaged in litigation a great deal. There were five lawyers there who often tried cases, at least occasionally; but I handled almost all of the appeals in that law firm. The result of that was that I handled or I helped handle about 50 cases. I say about 50; I think the true number is 54, but I am not certain. It was about 50 appellate cases which I had briefed and argued orally, which I think is a substantial number of appeals, even for someone who has been in practice far longer than I.

In addition to my litigation practice, most of my clients have been local government clients. The nature of that work is such that you are obligated to come to grips with the Federal Constitution on a day-in, day-out basis. Notions of due process, equal protection, and first amendment rights come up on a day-to-day basis when you are talking about resolving things like that. And I had to deal with those on behalf of those clients. I think that has been a good experience.

In addition to my actual law practice, my law school was nice enough to invite me back to become a part-time member of the faculty. I taught trial practice for 9 years at the University of Georgia. Teaching third-year students trial practice requires you to review the fundamentals every quarter, or nowadays every semester. I thought that was a good experience, a valuable one for me; in particular, I enjoyed working with the students.

Additionally, I have written and spoken quite a bit concerning all my legal experiences. I have written several Law Review articles.

The long and short of all of this is that I think the confluence of these experiences has prepared me to take on the privilege of serving in the circuit court.

Senator McCONNELL. Thank you.

In reviewing the file, I noted that only approximately one-half of 1 percent of your total litigation involved criminal cases. Do you feel that your relative lack of criminal trial experience will in any way hinder you in the performance of your duties as a Federal circuit judge?

Mr. EDMONDSON. I do not believe that it will hinder me in the sense of causing the public or the Nation any harm. I think it will require me to work harder in certain cases because I will need to be more fastidious than usual to make sure that I really do understand what the issues are and what the pertinent law is. I do not believe that it will be a problem in terms of final results.

Senator McCONNELL. It seems there are Federal judges who are undertaking long-term efforts in administering institutions such as prisons, mental health facilities, schools, and so forth which are found to be in noncompliance with some provisions of the law.

What concerns, if any, do you have about this apparent trend on the part of judges to perform a continuing administrative oversight function in this context?

Mr. EDMONDSON. I have two concerns. One, I suppose, is jurisprudential or philosophical; and that is I am not sure that the courts ought to be carrying out on a continuing basis executive functions, such as, running prisons or mental health hospitals and so forth. It

is very unnatural to keep continuing injunction with that and to have equitable remedies that are tailored to cover those situations.

I also think that the separation of powers is something which ought to alert judges to try very hard to stay away from running a prison for 5 years or running a mental hospital for 2 years.

Totally apart from jurisprudential considerations, I have some practical concerns that the judges simply do not have adequate time and staff and facilities to operate ongoing large institutions.

Senator McCONNELL. Chief Justice Burger has commented, quote,

Those who look to judges and especially tenured judges to innovate and reshape our society would do well to ponder what remedy is available if the world shaped by the judicial process is not to their liking.

Have you considered the Chief Justice's comments? And do you agree or disagree with his statement?

Mr. EDMONDSON. I agree with his statement. I think that this is another argument for why courts ought to be restrained in their impact on society, and whenever possible, allow the other branches in the Federal Government or the State governments to take the lead in shaping social policy.

Senator McCONNELL. One final question: You informed the committee that in order for indigents accused of crimes to be provided better representation you advocate the creation of a public defender's office for the county of Gwinnett.

What is the status or your recommendation, and do you intend to pursue that goal?

Mr. EDMONDSON. This is something which I had probably first discussed with the judges in Gwinnett County when I was president of the Gwinnett County Bar Association, which has been several years ago. It is an issue which recurs, and I have spoken to them and to others on behalf of that process.

It is something which I do not believe is going to occur in the foreseeable future, primarily because of the financing of such an office and taxes and other factors that really go beyond the courts.

If confirmed, I do not know whether it would be permissible for me to continue to advocate such an office, but I certainly think that indigents would be better served in Gwinnett County if they had a public defender's office.

Senator McCONNELL. Thank you.

Senator Simon.

Senator SIMON. Thank you very much.

Mr. Edmondson, going very quickly through your background here, I notice that you are a member of the Lawyers Club of Atlanta.

Can you tell me what kind of organization that is?

Mr. EDMONDSON. Yes; the Lawyers Club of Atlanta is largely a social organization, I suppose. We meet about 10 months a year for dinner and there is a speaker. It is an organization where membership is by recommendation and nomination and invitation. You have to have been a member of the bar for, I think, 4 years before you are eligible to become a member.

There is also one or two larger social events, like at Christmas and maybe in the middle of the summer. It is largely that kind of an organization.

Senator SIMON. Are there any women or blacks or Jewish members of the organization?

Mr. EDMONDSON. Yes; there are women members and black members and Jewish members of that organization.

Senator SIMON. So it is not an organization that discriminates.

Mr. EDMONDSON. No; it is not.

Senator SIMON. What about the Old War Horse Lawyers Club? You do not look old enough to be a member of the Old War Horse Lawyers Club.

Mr. EDMONDSON. I think I may be the youngest Old War Horse.

Senator SIMON. Yes. OK.

Mr. EDMONDSON. That is another lawyers club in Atlanta which is essentially social. I think in fact their motto is: We aim at nothing and seldom miss.

They hold two parties a year. It is open primarily to litigators as opposed to more general practitioners. It is also open, I think, primarily by invitation; people recommend you for it and you are voted in.

Senator SIMON. Again, do they have women members, black members and Jewish members?

Mr. EDMONDSON. Yes; that is certainly my understanding that they do, yes.

Senator SIMON. I also note that you are a recipient of a fellowship from the National Endowment for the Humanities to study individual values and professional responsibility.

Can you give me a 1- or 2-minute summary of what that was about?

Mr. EDMONDSON. I had been out of school about 10 years at that time, Senator, and thought it would be good to learn something different and to do something different.

That was a program which was conducted at the University of Kansas under the auspices of the department of philosophy. They chose people; there were 15 of us who were chosen nationwide. I think there were two lawyers, a judge; everyone else were nonlawyers. Basically the first 2 weeks were spent learning the fundamentals of moral philosophy in a really academic sense, going back and reading John Stuart Mill and that sort of thing again.

The last week was looking at hypotheticals which confronted people in various professions in modern life and going through, in some sort of systematic way, the analysis of Immanuel Kant or John Stuart Mill and how one would come out insofar as the moral consequences and ethical consequences of these various acts.

Senator SIMON. I note that the bar association gave you a mixed, qualified/not qualified rating. Do you have any feeling for why? It is the lowest grade that is possible to get and still be approved by the bar association.

Mr. EDMONDSON. Of course, I do not know how that was reached. My impression was that a substantial majority voted me to be qualified, and a small minority voted to the contrary. I suppose that small minority could have been as few as one, and it really is

very difficult to speculate about how one person, possibly, who you do not know, voted.

I would speculate, though; first of all, I think that there are people who believe that no lawyer under the age of 40 is qualified to sit on the circuit court of appeals. I have met people like that since I received my nomination, and that factor, in and of itself, might have been enough to motivate some people to vote unqualified.

Additionally, although I am a member of the American Bar Association and, in general, think it is a fine organization, in order to be active in the American Bar Association it requires a good deal of both time and money. And as a result, those persons who tend to be leaders in the ABA and most active in the ABA tend to be from larger law firms in larger cities. They have more time and more money to travel around the country and participate. There is certainly nothing wrong with that, but the point of it is that I think there may be a bias, to some degree, toward lawyers in bigger firms in bigger cities being better than lawyers from smaller firms in smaller towns. I would suggest that maybe that was a factor.

As you know, when you are evaluated, you are only interviewed by one member of the committee. I do not know how much weight should be given to negative votes by people who have never spoken to me or never saw me.

Senator SIMON. In going through this, and I have to say it has been a very hasty look at your record here, I do not find an obvious reason for your being a nominee. Do you have any reason why you are a nominee for the appellate court here today?

Mr. EDMONDSON. I do not know. I wanted to do it, and I was asked to come to the Justice Department for interviews. And I went.

Senator, I think I have a good record, and I think I made a good impression. I was looked into and thought to be a worthy candidate. Exactly how one is chosen, I do not know and do not have an explanation, except I am pleased to be chosen and I hope I was chosen because they thought I would do a good job for the country. I expect that is why I was chosen.

Senator SIMON. In glancing through your background, I noticed in the area of writings, work in the field of legal ethics.

You will be on the court that is just below the Supreme Court, where the questions you will face will primarily be constitutional questions. And I do not mean this disrespectfully, but I do not find any background in the constitutional area.

Is my impression wrong?

Mr. EDMONDSON. I think it may be wrong to some degree, at least. To represent, for example, the Gwinnett County school system, a school system with roughly 50,000 students and some thousands of employees in the fastest growing urban county in America, one has to be deal with constitutional concepts not only to litigate them—I have to go back tomorrow morning to participate in some arguments on a case involving an alleged first amendment violation—but to avoid going to court in terms of your general counseling of those kinds of clients. I have represented and I think now represent four municipal corporations and the school system and have done some work in the personnel area for Gwin-

nett County as well. I would contend, Senator, that to simply function in that context over a period of 10 or 12 years requires one to be somewhat conversant with constitutional concepts.

Additionally, I have litigated some of these, and some of the cases which I submitted on the questionnaire, not all of them, some of them, dealt with constitutional issues. For example, we had a zoning issue in one of our cities concerning the placement of TV satellite antennas, and it was a first amendment case. It was the confrontation of the first amendment and land use planning.

So I would contend this, Senator. Practitioners in local government law are among the primary students of the Constitution because it is through the powers of the State that the due process clause and all the other amendments come into play.

Senator SIMON. You mentioned a couple of cases that were first amendment considerations there. Do you have any reflections on the first amendment?

Mr. EDMONDSON. Well, I think that it is critical in its importance particularly when we are talking about free speech, noncommercial free speech. When we are talking about political issues and that sort of thing, the right of people to speak and be heard is very much tied into the decisionmaking process insofar as I am concerned. It is tied very closely with the right to vote, with the right to discuss political issues, to hear political issues and the right to vote, it seems to me are all very closely tied. And in general, I would say that I am very much in favor of a broad view of the first amendment.

Senator SIMON. If you were to place yourself on the civil liberties spectrum, say 1 to 10—and I realize these are very snap judgments here—but 10 being someone who feels very strongly about civil liberties, where do you put yourself?

Mr. EDMONDSON. I think I may be a 10. We may have to talk a long time, Senator, about what 10 is to some people and what 10 is to me.

Senator SIMON. I understand.

Mr. EDMONDSON. But I certainly contend that no one is a stronger advocate of the Bill of Rights and the rights of American citizens than I.

Senator SIMON. You mentioned civil rights. Do you have things in your background that show a sensitivity to the problems of minorities?

Mr. EDMONDSON. I think what I have in my background to show that sensitivity would probably tend to be the absence of things rather than the presence of things. Let me explain what I am trying to articulate here.

Again, in the representation of local governments, this is an area where it is easy, and it may even be easy for someone acting in good faith, to get in trouble in terms of violating someone's civil rights or discriminating against someone because of their sex or their race. I have been involved in local government law of practice for more than a decade now, and I think my clients have a good record of compliance.

Now, that is not entirely through my efforts. That is also in large part due to the fact that my clients, I think, are decent people trying to do the right thing. But I would contend that the fact that

we have not been embroiled in a lot of fights, have not been embroiled in a lot of litigation, and when we have been involved in litigation, we have, in general, prevailed, would tend to show that I am not someone who has a cavalier attitude toward the rights of any Americans including those minority groups that tend to raise suspect criteria.

Senator SIMON. Do you have any reflections on church-state relations?

Mr. EDMONDSON. I certainly believe in the separation of church and state. I think it is important, though, that the state not be antagonistic toward religion; that is to say, that in attempting to be unentangled with the church and in attempting to be secular that we do not, by inadvertence, punish religion or punish churches and so forth. And I think that is something that one has to look to be careful about. But certainly the basic notion of separation of church and state, I believe, is an important part of the Constitution.

Senator SIMON. I thank you. I have no further questions.

The hearing will stand adjourned.

Mr. EDMONDSON. Thank you, sir.

Senator SIMON. Thank you.

[Whereupon, at 2:40 p.m., the committee adjourned, subject to the call of the Chair.]

BIOGRAPHY

JAMES LARRY EDMONDSON

NOMINEE, U.S. CIRCUIT JUDGE, 11TH CIRCUIT

Birth: July 14, 1947, Jasper, Georgia.

Legal Residence: Georgia.

Marital Status: Married—Eugenia Dettelback, 2 children.

Education: 1965–1968—Emory University B.A. degree. 1968–1971—University of Georgia, School of Law, J.D. degree.

Bar: 1971—Georgia.

Experience: 1971–1973—Law Clerk, Hon. Sidney O. Smith, U.S. District Court, Northern District of Georgia. 1973—Pickett, Pickett & Edmondson, Partner. 1973–1981—Webb, Fowler, Tanner & Edmondson, Associate (1973–1976), Partner (1976–1981). 1975–1984—University of Georgia, School of Law, Adjunct Professor (part time). 1982–present—Tennant, Davidson & Edmondson, P.C., Member.

CONFIRMATION HEARING ON ANDREW J. KLEINFELD AND ROGER MILTON OLSEN

WEDNESDAY, APRIL 23, 1986

**U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.**

The committee met, pursuant to notice, at 2:21 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Simon and McConnell.

Staff present: Richard W. Day, chief counsel and staff director; Carl Hampe, counsel; DeeDee Herzog, staff assistant; Robyn Bishop, professional staff member; and Laurie Westley, counsel to Senator Paul Simon.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We meet today concerning the confirmation of U.S. district judge from Alaska, Andrew J. Kleinfeld, and assistant attorney general, Roger Milton Olsen of Virginia, to be Assistant Attorney General, Tax Division.

We will take the Senators first. They are always in a hurry. First is the senior Senator, Senator Stevens. We will be glad to hear from you.

Senator STEVENS. Mr. Chairman, could I defer to Congressman Young. He has got to get back to the House right away for a vote, so we thought we would let him go first.

The CHAIRMAN. Congressman Young, we are glad to have you with us. You may proceed.

STATEMENT OF HON. DON YOUNG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALASKA

Mr. YOUNG. Senator, it is a pleasure to be here, and it is a pleasure to be part of this program and this presentation for Andy Kleinfeld.

I am happy he has been nominated and look forward to his being confirmed by the Senate. He has done an excellent job in the State of Alaska and is highly respected, and I cannot see any reasons that he cannot be put into the position that he has been nominated for in an expeditious manner.

My senior Senators have worked very hard on this, and my junior Senator and I would like to remind them as the senior Congressman I am in strong support of this man's nomination.

Thank you.

The CHAIRMAN. Very good.

**STATEMENT OF HON. TED STEVENS, A U.S. SENATOR FROM THE
STATE OF ALASKA**

Senator STEVENS. Mr. Chairman, as you can tell, in our delegation we are in agreement on this nomination. When we knew there was a vacancy that would occur, Senator Murkowski took on the task of screening the applicants for this vacancy. Having reached his conclusion, he submitted that to Congressman Young and me, and we wholeheartedly approved his selection. But since it was in this instance his selection, we have opted to ask him to present the nominee to you for your consideration.

We do urge you to give prompt consideration to this nomination. Alaska is a small State, but it has a very large territory to cover in terms of our Federal judiciary. And the work load up there really requires this addition nominee to be confirmed as quickly as possible.

We appreciate your courtesy, and I am very pleased to be here with Andy and with his family whom you have just met. This is a very good selection, and I am happy to endorse his nomination.

The CHAIRMAN. Is there one judge for Alaska, or do you have two Federal judges allotted to Alaska?

Senator STEVENS. We have two but we also have at the present time a retired senior judge who is filling in. That will not last too long.

The CHAIRMAN. Thank you very much, Senator.

Just a minute before you go, Senator. Mr. Kleinfeld, I want to congratulate you on having the endorsement of the entire delegation. You just have one House Member, do you not, in Alaska?

Mr. KLEINFELD. Yes, sir.

The CHAIRMAN. Both Senators and your House Member recommended you, so you must be a mighty good man. Senator Stevens here has been here a long time and is also held in very high esteem. Senator Murkowski has been here only a few years, but he is also held in high esteem. With the appointment by the President and having both these Senators supporting you, including the House Member, too, it seems to me your confirmation ought to be a shoo-in, unless somebody raises some point on the other side we do not know about.

Thank you very much.

Mr. KLEINFELD. Thank you, Senator.

**STATEMENT OF HON. FRANK H. MURKOWSKI, A U.S. SENATOR
FROM THE STATE OF ALASKA**

Senator MURKOWSKI. Mr. Chairman, thank you for the opportunity to introduce to the committee Andrew J. Kleinfeld. First of all, let me recognize my two colleagues who have already spoken on behalf of our candidate: Senator Stevens and Representative Don Young. They share with me the pleasure of all Alaskans in

presenting to you, Mr. Chairman, the nominee of the President of the United States as U.S. district judge for Alaska.

Mr. Kleinfeld is an attorney in the town where I have lived for many years and still call home, Fairbanks, AK. He enjoys the wide respect of his colleagues and leading citizens of his community and has held numerous, prominent positions of leadership in the community as well as in the Alaska State Bar Association.

Andrew Kleinfeld graduated from Harvard Law School in 1970. He came to Fairbanks on a temporary basis as a law clerk for State Supreme Court Justice J. Rabinowitz. Following the completion of his clerkship, Andy established a law practice in Fairbanks. His practice covered a wide variety of fields of law, though civil litigation eventually became his specialty.

Beyond handling an active, private law practice, Andy has been deeply involved in bar association activities in our State. He has served as president of the local bar association and was later chosen as a member of the board of governors of the Alaska State Bar Association.

Finally, he was elected president of the Alaska State Bar Association for the 1983-84 term. As bar association president, Andrew Kleinfeld increased the efficiency of the discipline system so that instead of taking as much as 18 months to 2 years to process the average case, the bar could act in a few months. He also changed the bar's continuing legal education program from one that offered a small number of lengthy and rather expensive programs, attended mostly by attorneys from a few agencies and perhaps the larger firms, into one providing a large number of relatively inexpensive programs attended by a vast number of younger lawyers coming in from all over the State. And I might add that he accomplished these goals without seeking additional bar dues increases.

Andy Kleinfeld enjoys, of course, the respect of his colleagues; Alaska State judges are selected by a poll of the bar association members and nomination by a nonpartisan judicial council. Under that process Andy was twice nominated by the judicial council to serve on the Alaska supreme court.

In making our recommendations to the President, Mr. Chairman, Senator Stevens, Congressman Don Young and I worked closely with the State bar association to develop a list of qualified candidates and to poll members. Through this process Andy Kleinfeld was rated highly, very highly by attorneys throughout the State of Alaska. In the fourth judicial district where he practices law, the attorneys rated him far higher than any other candidate.

In addition to his law practice and bar service, Andy has written extensively for numerous law journals, including the *UCLA Law Review*, the *Family Law Quarterly*, and the *Harvard Journal on Legislation*. Andy's broad and varied background in the practice of law should bring to the bench a unique understanding of cases that would come before him as a U.S. district judge.

It is my firm belief, Mr. Chairman, that Andrew Kleinfeld will be an asset, an outstanding asset to the Federal judiciary, and I am pleased that the President has now formally nominated him.

Mr. Chairman, I would like to take this opportunity to introduce formally to this committee Mr. Kleinfeld's family. His wife Judith is in the back—if she would be recognized please—she is a profes-

out at the University of Alaska in Fairbanks, and is accompanied by their children, Daniel, who is 11 years old, Rachel, who is 10, and Joshua, who is 8.

Andy is also privileged to have his parents with him today. Irving and Shirley Kleinfeld are attending this very important event in their son's life this afternoon.

Mr. Chairman, I join with my colleagues, Ted Stevens and Don Young, in expressing our appreciation for the opportunity to introduce Andy Kleinfeld to the committee, and I would ask that you favorably report his nomination to the Senate.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator. We are very pleased to have you here, of course. You can stay longer, if you wish, and if you feel you have to go, you can go.

I have already extended my congratulations to him for having both Senators and the House Member supporting him in this nomination.

Senator MICHAELSEN. Thank you, Mr. Chairman. It is always a privilege to appear before you.

The CHAIRMAN. I understand Senator Warner just came in. Where is he? I know he is busy, too. Those Senators are so busy. I will be glad to hear him, and then we will swear in the witness.

Senator Warner, if you will come around. We are very pleased to have you here, and I guess you want to make a statement on behalf of Mr. Roger Milton Olsen.

STATEMENT OF MR. JAMES WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. That is correct, Mr. Chairman. It is always a privilege to appear before you, Mr. Chairman, and members of this committee, on behalf of individuals seeking to serve their Nation in a variety of capacities.

Today it is a pleasure for me to introduce to the committee Roger M. Olsen as the nominee to be Assistant Attorney General in the Tax Division of the U.S. Department of Justice.

Mr. Olsen has been a resident of Alexandria, VA, for more than 6 years. His undergraduate degree came from the University of California at Berkeley where he distinguished himself not only as a scholar, but also as an all-American track and field athlete and an NCAA high jump champion.

After college, he attended graduate school at the University of Southern California before returning to Berkeley for his law degree.

He completed his formal education with an LL.M. in taxation from George Washington University.

Roger Olsen served as deputy district attorney in Alameda County, CA, for 4 years. He worked as a trial attorney in the Tax Division of the U.S. Department of Justice for 1 year. He was in private practice as a tax specialist for 1 year in California and Washington before returning to the Department of Justice to serve as the Deputy Assistant Attorney General in the Criminal Division in 1981. Since that time, he has remained with the Department of

Justice as Special Counsel to the Associate Attorney General and Deputy Assistant Attorney General in the Tax Division.

Throughout his distinguished career, Roger Olsen has earned the respect of his colleagues and peers, both in the public and private sectors. He has demonstrated his dedication to public service, and I am confident that his exceptional qualifications and breadth of experience ensure his continued success as Assistant Attorney General of the Tax Division.

Mr. Chairman, we are privileged to have with us today his wife, son and godparents. I wonder if the nominee might introduce his family to the Chair.

The CHAIRMAN. We would be very pleased to have him introduce his family.

Mr. OLSEN. Senator, my wife Joanne, my son Nicholas, my godparents Paul and Tula Kodopoulos from Potomac, MD.

The CHAIRMAN. Senator Warner, we thank you for your appearance. I know how busy you are, and I congratulate Mr. Olsen on having your backing.

Senator Warner is one of the most influential and finest men in the Senate. We are very pleased to have him here.

Senator WARNER. Thank you, Mr. Chairman.

The CHAIRMAN. I think both of you might stand up and be sworn at the same time.

Do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KLEINFELD. Yes.

Mr. OLSEN. Yes, it will.

The CHAIRMAN. Mr. Kleinfeld, if you will come around.

TESTIMONY OF ANDREW J. KLEINFELD, OF ALASKA, NOMINEE FOR U.S. DISTRICT JUDGE FOR THE DISTRICT OF ALASKA

The CHAIRMAN. Mr. Kleinfeld, what are your views on the primary purposes of the criminal justice system?

Mr. KLEINFELD. I think that the primary purpose from the point of view of a judge ought to be to assure that when people are charged with crimes, they obtain fair trials, that there is an appearance and a reality of justice. If they are convicted, then the sentences must adequately protect the public.

The CHAIRMAN. How long have you practiced law?

Mr. KLEINFELD. I entered the private practice of law June 1971, so that would be 15 years in the private practice of law.

The CHAIRMAN. Mr. Kleinfeld, would you briefly tell the committee your role in the offering of a memorandum to the Fairbanks North Star Borough School Board regarding the availability of the school system's libraries of the book, "Way of Love: A Way of Life"?

Mr. KLEINFELD. Yes, Senator. In that matter, a lady with whom I was acquainted approached me and told me that some parents were concerned about a book in the school library because of all sorts of things they did not like in it; references to use of poppers, the how-to-do-it aspects failure to refer to AIDS, various other things that bothered them. Different parents were bothered by dif-

ferent things in the book. The lady asked me to take a look at it and tell her what I thought because these people were interested in my views, on a no-fee basis.

I did that. I took the book and read it, studied the school board regulations requiring the school library books to be accurate and up-to-date, and studied the medical opinions which the school board had obtained from Dr. Lundquist and from the health services coordinator of the school district saying that the book was not accurate and up-to-date because it failed to mention AIDS in its list of venereal diseases that children might risk if they experimented with homosexuality, although it did mention baths as a place to become acquainted with people for that sort of thing.

I advised her, after studying that and studying the case law, that in this particular factual context where we were not addressing a court and asking a court to make any decision, but rather addressing the school board and asking it to exercise its discretion—which I believed it had under the Supreme Court decisions in point—and where the school board's regulations were violated according to the expert opinion which the school board had obtained from the physician and health services coordinator, that I thought that it would be within the board's discretion either to keep the book on the shelves or to take it off the shelves, and that I thought it was legitimate and appropriate for the parents to ask that the book be removed from the shelves. My personal feeling was that, out of respect for the parents' concerns about their children, that it was appropriate to remove the book from the shelves and perhaps send it over to the public library. Although it would not have been appropriate to try to take the book out of a bookstore or anything such as that, I thought that in this particular factual context the parents had a legitimate point of view, and on a pro bono basis I wrote a memorandum expressing that point of view, which I understand the parents submitted to the school board.

The CHAIRMAN. Mr. Kleinfeld, would you briefly tell the committee what the basic premise of the argument was insofar as removing the book from the school libraries, and how do you reconcile this with any first amendment consideration?

Mr. KLEINFELD. Senator, I think that the law is often a matter of detail and facts, particularized factual and procedural situations. I thought that in the particularized factual situation here, it was legitimate, because schools are a compulsory institution and ought to show some respect for parents' concerns about the teaching that the schools are bringing to their children, particularly in a situation where the school board's own regulations appear to be violated on a health basis, having a legitimate reason.

If this book had been for sale in a bookstore, I would have been on the other side of this case, if someone had tried to take it out of a bookstore. The first amendment, I think, protects the right of a bookstore to sell the book. It does not require that a school board's discretion be limited in its decision on what the librarians put on or take off the shelves with respect to this particular book in this fact situation.

The CHAIRMAN. Mr. Kleinfeld, in his distinguished dissent in *Plessy v. Ferguson* in 1893, Justice Harlan referred to our Constitu-

tion as a color-blind Constitution. Would you agree with this characterization?

Mr. KLEINFELD. Senator, I do, and I have thought ever since reading that dissent while I was still in college that the Nation could have been saved a great deal of sadness if the majority of the Court has seen the wisdom of that dissent.

The CHAIRMAN. Mr. Kleinfeld, we frequently hear the argument that courts act in response to various social problems because the legislature has failed to act on its own.

How do you respond to this defense of an activist judiciary?

Mr. KLEINFELD. Well, I do not think it is an adequate reason to act for people with the power that the judiciary has, that somebody else has not acted as they see fit. I do not think the Constitution gives judges that kind of policymaking authority. I think it is undemocratic if judges try to exercise that much power. I think judges ought to take the particular cases that come to them and look at the facts and the law in those particular cases and follow it, particularly at trial level.

The CHAIRMAN. Mr. Kleinfeld, in response to the request made of you, I believe you wrote a memorandum to the Fairbanks North Star Borough School Board, July 1, 1984, on this book, "Way of Love: Way of Life"; is that correct?

Mr. KLEINFELD. I cannot remember the date, but I did write the memorandum. Yes, sir. About that time.

The CHAIRMAN. Without objection, we will place the memo in the record for the committee.

[Information follows:].

TO: FAIRBANKS NORTH STAR BOROUGH SCHOOL BOARD

FROM: ANDREW J. KLEINFELD

RE: A WAY OF LOVE, A WAY OF LIFE

July 1, 1984

A number of people have requested that I express my views on the school board's responsibility regarding A WAY OF LOVE, A WAY OF LIFE. This memorandum, written without fee, explains why I think it appropriate that the school board reverse Dr. Burnley's decision, and remove the book from school libraries. I take a civil libertarian view of tolerance for substantially any sexual activities between consenting adults, and of the First Amendment. Indeed, I think a serious civil libertarian view requires removal of the book.

THE BOOK

The book at issue was written by two members of the Gay Task Force of the American Library Association. One has degrees in library science and Latin American studies. The other is a hospital administrator with a bachelor's degree. Neither is a sociologist, psychologist, or otherwise expert in the subject, except that the authors are evidently a male and female homosexual with personal experience in the matters discussed. Perhaps their position in the American Library Association Gay Task Force gave the book some attraction to the Association when it recommended the book five years ago.

The theme of the book appears to be to make adolescents with homosexual desires comfortable with their sexual feelings and activities. It tells young people that

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 re: A Way of Love, A Way of Life

they should feel good about homosexual desires, how to find others with whom to enjoy homosexual sex, how to tell or not tell parents and friends, how to engage in oral-genital, oral-anal, and genital-anal sex, how to enhance sexual sensation by sniffing butyl nitrite, how to obtain medical help for venereal diseases, and so forth.

One chapter is a history of the world from a homosexual point of view, praising Greek civilization for its "central feature" of "love of an older for a younger man," and condemning Roman civilization for turning from sex to violence to asceticism. The chapter includes a tortured discussion of Old and New Testament sources, which learned religious people would doubtless find offensive, and others might find shallow and amusing.

The book ends with portraits of "A Dozen Gay Lives," arguing that homosexuality is a happy and satisfying life style. The recommended book list at the end conspicuously omits the leading sociological work on homosexuality, GAY by Morton Hunt. Possibly the authors' lack of scholarship led to this omission, since the Hunt book is sympathetic, or possibly they are displeased with its finding that homosexual lives are often desperately unhappy for reasons directly related to homosexuality.

The extent to which the book favors recruitment of young people is illustrated by the anecdote on page 45, of the male high school art teacher who meets a seventeen year old boy in a shop, rushes away, then returns with his own homosexual

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friend and searches for the boy, remembering his own need as a youth for a "role model." They found the boy, who "was excited to meet real gay men." The art teacher leaves without consummating the relationship, and feels "guilty that I was not able to do more for him."

The authors use this anecdote as an example of how adult homosexuals should open up communications with young people who appear to have homosexual inclinations. Many parents of teen agers not yet sexually active, and possibly unformed in their sexual preferences, would doubtless prefer that homosexual teachers not initiate this sort of communication, or attempt to serve as sexual role models. Had the art teacher taken matters a bit further, he would have been guilty of a felony, for the excellent reason that sexual relations between adults and children are inherently coercive and threaten the young persons' future development.

The only person portrayed unsympathetically is a boy who breaks off a friendship when he discovers that his male friend is homosexual. (p. 80) The authors regard his action as a personal failing, and condemn his concern that if he maintained the friendship, others would think that he was homosexual. Most parents would doubtless want their teen aged children to break off friendships for just this reason, because of the risk that the friendship would draw their child into sexual activity which the child was not ready for, and which might harm the child's development.

The book is not, in my view, of high quality. It is not a serious scholarly work.

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The authors have no scholarly credentials on their subject. It has no objectivity.

I do not agree with its assumption that high school students are, and should be, sexually active, and should be exploring various forms of sexual activities. I strongly disagree with its implicit approval of adult recruitment of young persons into homosexual lives. Probably most youths will become heterosexual regardless of influences which may be imposed by the schools, some will become homosexual regardless, but some will be open to influence. I do not think public schools ought to provide influence toward homosexuality, and doubt that they should participate at all in the sensitive and controversial area of teen age sexuality.

THE CONSULTANTS' REPORTS

The school superintendant received critiques from a physician, Dr. James Lundquist, and Ms. Carolyn Hoover, the health/science coordinator for the school district, before making his decision. Both noted that the book is dangerously incorrect and out of date in its discussion of sexually transmitted diseases.

The most frightening and dangerous omission is the failure of the book to discuss acquired immune deficiency syndrome (AIDS). This is an incurable, deadly disease, not yet fully understood, but apparently most readily spread by male homosexual activities. It has become very widespread in certain homosexual communities. San Francisco and New York homosexuals now regard homosexual bath

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houses as serious hazards to life, yet the book discusses "the baths" as places to make sexual contacts without mentioning this hazard.

THE BURNLEY DECISION

Dr. Burnley decided to place the book on "restricted access" for students in grades 9 to 12, in all junior-senior high school libraries. He does not explain how access is to be restricted, and limits the role of parents to telling their children (not the school) not to read or check out the book.

Dr. Burnley neglects to mention the expert opinions which he implicitly rejects. He offers no justification for his rejection of the opinions of Dr. Lundquist and Ms. Hoover. This omission makes his opinion highly vulnerable to court challenge.

Dr. Burnley's opinion also omits any mention of the school system regulations on library books.

Administrative Regulation 971.2, Jan. 21, 1983, states that materials selected should "present valid, accurate, and up-to-date information." The expert opinions in Dr. Burnley's hands demonstrate that the book at issue does not satisfy this requirement.

The regulation requires that materials selected "give an objective, factual

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presentation of both sides of an issue." This pro-homosexuality book does not.

Treatments of sex, under the regulations, "necessitate a searching evaluation of the merits of its literary quality, truth to life, relevance to the curriculum, and suitability to the age levels." Dr. Burnley's decision does not evidence any such "searching evaluation."

These omissions from Dr. Burnley's decision make it a thin reed indeed. The school board probably cannot sustain a decision in court in reliance upon Dr. Burnley's decision.

THE LAW

The courts are in disarray on this issue. The Alaska Supreme Court has not yet ruled. The circuit courts are divided. The United States Supreme Court accepted a case, but could not assemble a majority for any opinion.

The United States Supreme Court decision is Board of Education v. Pico, 102 S.Ct. 2799 (1982). Students sued a school board for removing certain books. The trial court granted the school board summary judgment, i.e., held that even if the facts were as the students claimed, they would not be entitled to win. The circuit court reversed, holding that the students were entitled to a trial to determine whether the school

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board acted from improper motives. The supreme court affirmed the circuit court decision, requiring a trial.

Five justices believed that the facts should be determined by a trial before the final decision was made. That is all they could agree on.

Three of the five wrote a plurality (not majority) opinion, two concurred in part and dissented in part, and four wrote dissents.

The three justice plurality conceded that school boards must be permitted to "transmit community values" and to engage "in promoting respect for authority and traditional values" (p. 2806) and "have a substantial legitimate role to play in determination of school library content." (p. 2809). Its opinion, was, however, that the school board "discretion may not be exercised in a narrowly partisan or political manner," as, for example, by excluding all books written "by or in favor of Republicans." (p. 2810) The plurality opinion was concerned that the school board removed the offending books after its members attended a conservative political caucus.

One concurrence said that "politically neutral reasons" must be present among the motivation for the decision, such as offensive language or psychological or intellectual inappropriateness for the age group, or advancement of ideas "manifestly inimical to the public welfare." (2815)

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The other concurrence says that the school board motivation was factually unresolved, and should be determined by a trial. The plurality and other concurrence are condemned for writing a vague constitutional law opinion before the facts were in.

The four dissenters are generally agreed that school boards, not courts, ought to make school library book decisions.

Something but not much can be inferred from this unsuccessful attempt by the United States Supreme Court to deal with the issue. We know that the school board could not remove the book as part of a scheme to impose political orthodoxy on the schools, but it is hard to see how removal of a book on homosexuality could be part of such a scheme. We also know that the board may remove the book lawfully, if its motivation is politically neutral, as, for example, to remove medically outdated and educationally unsuitable material.

POSSIBLE COURT CHALLENGES

Since the law is so unformed in this area, court challenges and their outcomes are unpredictable. If the school board removes the book, advocates of its presence may sue for an injunction requiring that it be put back on the shelves. If it affirms Dr. Burnley's decision, offended parents may sue for an injunction requiring its removal.

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An interesting litigation possibility would be a wrongful death suit on behalf of a student who reads the book, experiments with male homosexuality, and dies of AIDS. His parents might sue the school board on the theory that it gave its imprimatur to what it knew (because of Dr. Lundquist's and Ms. Hoover's advice) to be a whitewash of the health risks of homosexuality, their child was attracted to experimentation by the book, and died as a result.

There is so high degree of unpredictability to the outcome of litigation, and so high a risk of being sued no matter what it does, that the school board may as well do what it thinks is right, instead of trimming its sails to avoid being sued.

COMMUNITY CONTROL OF THE SCHOOLS

I think Dr. Burnley should have removed the book. Why is a civil libertarian with a tolerant view of homosexuality taking this view? I think the critical consideration is a decent respect for the attitudes of the parents and the community. If the school board affirms Dr. Burnley's decision, this will represent a rejection of democratic for bureaucratic control over this decision. I think the community is entitled to control of its schools in this matter.

The argument for depriving the parents of community control has been cloaked as a civil libertarian objection to censorship. This argument is illogical and disingenuous.

July 1, 1964 memorandum to school board
 re: A Way of Love, A Way of Life

The censorship argument is illogical, because it must assume that all books are available in the school libraries except for those removed by the school board. Obviously shelf space and money constrain the available selection. The internal selection procedure certainly limits the books available to those approved by school library selection personnel. Why should school librarians have unfettered power to determine what shall be read in school libraries?

The question is not whether availability of books in school libraries will be limited. They will be. The question is whether the censorship decisions of the library bureaucracy will be reviewable by an organ of government elected by the people.

The disingenuous nature of the "censorship" argument is highlighted by the refusal of the schools to accept certain anti-abortion books offered at no charge to the school libraries. Ms. Carol Colp has represented to the public that the school district rejected three anti-abortion books, one by the most highly regarded scholar on either side of the issue, John Boonin, Jr. (Colp letter, News Mirror 4/26/84). Do the school librarians prefer pro-homosexuality books to anti-abortion books, and exercise censorship at the bureaucratic level to impose this preference on the children of the community?

"Censorship" in a serious sense occurs when reading matter is made altogether unavailable, as, for example, in the anti-pornography ordinances implemented by

July 1, 1986 correspondence to school board
re: A. Way of funds, B. Way of staff

business groups. But we are both aware, as always, not to do anything unless something is available. Education is part of the management of our own institutions, whether the thing itself goes to a law library with the law faculty, or the thing itself goes to a school library with the faculty appropriate for the students of the school.

In the case of a school library, a degree of responsibility is given to a faculty which is a part of the staff. Young people understand that school can happen there and the school does actually, so they naturally take something from the fact that something is put before them. I think it would be entirely appropriate for both kinds to call it West off funds, a West off staff, and probably appropriate for the library library to offer the book through, perhaps, for the collection regarding 1986. Community of business showing us what the book would make business community aware of our actions. But excluding the book from school library is a different kind of decision from putting out a distribution of the book.

A serious and thoughtful perspective must take account of the complete nature of schooling. The complete nature requires serious responsibility to the success of the community. Therefore the government program is itself an active agent of power over the children in the community. When the school gets that responsibility to propagate the culture of school culture rights, attention is made of the community, away from the need of democracy around which right is made clear.

When the Board selected a community, response and is adding the library.

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It was reported that the response was overwhelmingly in favor of removing the book. Since education is compulsory and most parents probably cannot afford to put their children in private school, a decent respect for others should have led Dr. Burnley to defer to the wishes of the community. Instead, he made a decision flying in the face of community preferences, applicable regulations, and expert opinion.

In view of the school system admissions that community response favored removal, the burden of proof is on Dr. Burnley to show that most parents would like to see A Way of Love, A Way of Life on school library shelves. But even if he somehow made such a demonstration, removal would still be desirable.

We know that a very substantial body of intensely held opinion in Fairbanks favors removal. The school system should not ride roughshod over these people. It is no insult to homosexuals to remove the book. No one proposes to put anti-homosexual literature in the school libraries. I cannot see why school libraries need use their limited budget and shelf space to deal at all with this sensitive topic.

It is an insult to the religious, the sexually conservative, and the sexually protective parents of this community to impose homosexual recruitment literature on school libraries. The schools cannot function effectively without the trust of the community. The decision by Dr. Burnley to place this book in school libraries undermines community confidence that the schools are democratically controlled.

July 8, 1984 memorandum to school board
 re: A Way of Love, A Way of Life

The schools should not engage in cultural warfare against the community they serve. Nor should they undermine parental authority over their children's sexual development.

Certainly the majority of the community is entitled to have the schools respect their views on so private a matter as sexuality. Nor should the cultural preferences of an intense and substantial minority be attacked by the schools. Parents typically care a great deal about their children's sexual development, and the subject is quite remote from what most parents see as the central educational functions of the schools. The Fairbanks schools should have their library shelves quite full with literature, mathematics, history, science, and other incontrovertibly appropriate subjects, without also having to promote school librarians' views on sex. Sexual missionary work by the schools against the parents gratuitously insults the parents for no substantial or legitimate educational purpose.

Someone is going to select, the books available in school libraries. This selection process is not censorship, because it does not exclude the books from stores or general public libraries, but it does limit availability of the books in the school libraries.

Shall the cultural preferences of the school bureaucracy exercise this selection and limitation of books available without democratic restraint, or will the school board show a decent respect for the opinions of the community?

Mr. KLEINFELD. Thank you, Senator.

The CHAIRMAN. I think that is all the questions I have. Now I turn to the able and distinguished Senator from Illinois, Mr. Simon.

Senator SIMON. Thank you very much, Mr. Chairman.

First of all, you have served as president of the Alaska Bar Association, which is an honor. For I noted in going through your record that you have a tradition of voting on potential nominees in Alaska. I am not that familiar with it, but I did note that two other attorneys received appreciably higher votes in that polling than you did.

Why do you think you were selected as the nominee?

Mr. KLEINFELD. Well, Senator, I would not want to second guess the President of the United States in making his selection, but with respect to the bar poll I think I can offer a little bit of assistance in understanding the numbers.

Senator Murkowski and the rest of the delegation asked the bar to conduct a poll, but they specified that the poll should not be tabulated on a statewide basis, that it should be tabulated by region. This is because there is a great deal of intense regional rivalry in the State of Alaska between the interior, mainly Fairbanks, and south central, which is mainly Anchorage, and southeast, which is mainly Juneau and also Ketchikan. As a result of that rivalry, it is very unlikely that anyone from outside of Anchorage will ever do particularly well in Anchorage.

Here is the way the bar poll came out in the fourth judicial district, where I practice, which is the interior of the State I guess it must be some hundreds of thousands of square miles, larger than most States, but actually it is mainly Fairbanks in terms of population. In that region, I came out highest on the bar poll by a very considerable margin. The other persons came out much lower, including those whose names were also submitted to the executive branch. But they were also acceptable to the bar. The bar basically indicated in the fourth district that they wanted me and that those other two, or at least one of them, looked acceptable. In the third judicial district, which is mainly Anchorage, the bar indicated that they wanted one of the other fellows, but that I was acceptable.

I do not think the bar believed that the Constitution lodged in them the authority to pick the judges. I think that they understood that the President nominates and, with the advice and consent of the Senate, appoints. They indicated that I was acceptable statewide and by far the first choice of lawyers in my judicial district.

Senator SIMON. I notice in going through your statement that your net worth while it is not huge, it is substantial. Can you indicate something to me of your background that indicates that if someone comes before your court with very, very limited assets that you are going to be sensitive to their plight?

Mr. KLEINFELD. Senator, I have been representing people with very limited assets for years and relate to them as human beings, not different in any ways that are important to me from wealthy people.

I consider myself very fortunate, and I am also somewhat surprised, at just how much I have accumulated. That means I do not

have to worry about money anymore, but it certainly does not ally me with people who have considerable assets.

Senator SIMON. Senator Thurmond asked about the one book. Can you tell me just in general, and I was pleased with your comment about the bookstore, but just in general your attitude toward the first amendment and first amendment rights.

Mr. KLEINFELD. Well, I think you are probably aware from the very limited amount of criticism which I understand came into the committee that just about all of it has been on the basis of free civil liberties cases that I have taken on. I take the first amendment very seriously, and I believe that it applies to everyone. The boundaries of it do not stop where anyone's pet issue starts. It is to my mind probably the most important of the liberties preserved in the Bill of Rights, because the democratic system relies upon it.

Senator SIMON. I note that there has been a letter received from Dr. Carolyn Brown. Let me read part of this to you.

I have been told that Mr. Kleinfeld alludes to significant participation in litigation currently under way between Alaska Right To Life and myself. It is not entirely clear why he has said this. In the 5 years that I have been significantly involved in this litigation, I have never met, heard of or dealt with Mr. Kleinfeld.

Would you want to just clarify for us what your role may have been in this field?

Mr. KLEINFELD. Thank you, Senator. I think that letter illustrates the value of the hearsay rule. I believe what I stated in my references to that case was that I was honored to be offered the opportunity to offer my counsel to Right To Life when their first amendment rights were threatened. And that is what I did.

In that case I happened to be acquainted and friends with the lawyer who does Right To Life's work in Anchorage. Anchorage is 365 miles away, so it is not practical for me to appear in court and file appearances in their Anchorage cases and litigate them fully. In that case I was consulted, offered my advice, and continued to offer my advice on the case, because I thought, as Steven Chapman wrote in the Chicago Tribune, I believe it was, that the kind of vigorous rhetoric that Right To Life used is protected by the first amendment.

Senator SIMON. I have no further questions.

The CHAIRMAN. Thank you, Senator.

Mr. Kleinfeld, you seem to have a fine record, highly endorsed and appointed by the President. I should not anticipate any trouble getting you confirmed.

At any rate, you will be placed on the calendar as soon as this can be arranged. We congratulate you and wish you well on the bench.

Mr. KLEINFELD. Thank you very much, Mr. Chairman and Senator Simon.

The CHAIRMAN. Now, Mr. Olsen, if you will come around please.

TESTIMONY OF ROGER MILTON OLSEN, OF VIRGINIA, NOMINEE FOR ASSISTANT ATTORNEY GENERAL, TAX DIVISION, DEPARTMENT OF JUSTICE

The CHAIRMAN. Mr. Olsen, would you summarize for the committee your background and legal experience?

Mr. OLSEN. Yes, Senator. I attended the University of California at Berkeley for 4 years, graduated in 1964 with a bachelor's degree. I then enrolled in graduate school at the University of Southern California in Los Angeles in American Government and after 1 year decided that I preferred to become a member of the legal profession, so I enrolled at the University of California at Berkeley School of Law, also known as Bolt Hall.

Between my second and third year, I clerked in the Alameda County district attorney's office and finished my third and final year at the School of Law and graduated in 1968. After taking the bar examination and passing it, I became a deputy district attorney in the Alameda County district attorney's office, working at that time for D. Lowell Jensen.

In June 1972, I left the district attorney's office, came back to Washington, DC, as a trial attorney in the Tax Division with the Justice Department, handling civil tax cases during that time.

I married and received my LL.M. in taxation from George Washington University, and in January 1977 I entered private practice and was engaged in private practice both in San Francisco and then in Washington, DC, primarily as a civil tax attorney.

In the fall of 1981, I was asked by D. Lowell Jensen to become his Deputy Assistant Attorney General in the Criminal Division where I supervised the Office of International Affairs, the Fraud Section, and the Appellate Section.

When Lowell Jensen became Associate Attorney General, I went with him in June 1983 as his special counsel and then in September became the principal Deputy Assistant Attorney General in the Tax Division with responsibility primarily over the criminal section.

One year later, the other Deputy Assistant Attorney General, B. John Williams, who is now a judge in the Tax Court, left to enter private practice, and no replacement was secured for him so I was given the responsibilities of supervising all civil and criminal tax litigation in the Tax Division.

In December of 1985, Glen Archer was appointed to the U.S. Court of Appeals for the Federal Circuit, and I became Acting Assistant Attorney General and have been serving in that capacity since then.

The CHAIRMAN. Without objection, I will ask that brief résumés of Mr. Kleinfeld and Mr. Olsen be included in the record.

Mr. Olsen, the primary function of the Tax Division is to aid the Internal Revenue Service in collecting the Federal revenue and to establish principles of law which will serve as guidelines to taxpayers and their representatives, as well as to the Internal Revenue Service. The Tax Division usually works closely with the chief counsel of the Internal Revenue Service in deciding which tax cases to bring.

You have served as Deputy Assistant Attorney General for the Tax Division since 1983.

Mr. OLSEN. Yes, Senator.

The CHAIRMAN. Would you tell the committee how this has been a cooperative effort, and what recommendations, if any, you have in this area of litigation policy?

Mr. OLSEN. Yes, Senator.

The CHAIRMAN. You need not go into it in great depth; just briefly.

Mr. OLSEN. The Tax Division has on the criminal side looked at ways in which the Department of Justice and the Internal Revenue Service could improve the way that criminal tax cases are both investigated, reviewed, and successfully prosecuted. To that end, we have accomplished, I think, a number of noteworthy achievements, including changes in the authority within the Justice Department for authorizing certain investigative techniques, such as search warrants, such as plea agreements, to expedite the processing of cases which I think are very clearly going to be disposed of on a plea basis.

We have historically been successful, somewhere between 93 and 96 percent of prosecution of our criminal tax cases. We have been able to modify and make changes on the procedural lines, including the review of criminal tax cases and still maintain that high standard.

On the civil tax side, we have also been able to successfully bring a number of injunctions, lawsuits against promoters of fraudulent and abusive tax shelters, and to date our record is one that I think could be unexcelled. We have not lost an injunction suit against the promoter of an abusive or fraudulent tax shelter.

From the standpoint of talking to the historians about the relationship between the Tax Division and the IRS, I am told that our relationship is now better than it has ever been before and that our working relationship is one that we hope we can maintain and have on a permanent, institutional basis, even beyond the terms of this present administration.

The CHAIRMAN. Mr. Olsen, the Criminal Investigation Division of the IRS has played an ever-increasing role in the effort to deter criminal activity in the area of organized crime, white collar crime, and in particular narcotic traffic.

I am concerned that insufficient assistance and support is provided to special agents of the Criminal Investigation Division. In fact, the IRS has called for support of proposed legislative changes to the Bank Secrecy Act, increased recognition for the role IRS plays in narcotics investigations, as well as sufficient budgetary support to maintain that commitment to narcotics enforcement.

Would you please tell the committee if you agree with the IRS position, and what, if anything, can be done to assist the Criminal Investigation Division in their ever-increasing work load?

Mr. OLSEN. Senator, the Internal Revenue Service Criminal Investigation Division is, in my opinion, second to none in being able to conduct white collar crime investigations which are, in essence, that part of the investigations relating to narcotics and organized crime. They are the paper trail, if you will, the money trail for those types of crimes. And the Internal Revenue Service's Criminal Investigation Division could certainly use additional manpower resources. It is their recommendations and the recommendations of this administration to tighten up the loopholes in the law enforcement techniques as well as the Federal statutory authorities relating to the Bank Secrecy Act and currency transactions reporting requirements would aid this Government in trying to put a stop

and bring under control white collar crime and narcotics trafficking, drug smuggling.

The CHAIRMAN. I understand from Mr. D.G. Smith, chief of the criminal investigation division, that the State of Florida has done an outstanding job in the area of investigating narcotics traffickers and should be commended for his effort. Are you familiar with that?

Mr. OLSEN. Not with Mr. Smith personally, but with the efforts made by the State of Florida in this regard.

The CHAIRMAN. I understand the IRS has given him an award for this.

Mr. OLSEN. Yes.

The CHAIRMAN. Mr. Olsen, the Internal Revenue Service has severe restrictions against providing taxpayer related information even to other Government agencies and at one time was unable to fully disclose criminal information obtained from the taxpayer or his records to the Government agencies exercising appropriate jurisdiction over that activity. Are you aware of any problems in this area?

Mr. OLSEN. Senator, the limitations on the ability of the Government to exchange information, whether it comes from the limitations of section 6103 of the Internal Revenue Code, the fact that there are information restrictions, or the Rule 6(e) of the Federal rules of Criminal Procedure have an adverse impact on the ability of the Government to bring to justice those people that are violating the law.

In the case of taxpayer information in section 6103, it is ironic that we have standards through the statutory scheme which actually operate as a benefit for those people that are committing nontax crimes. Let me give you an example.

If the Internal Revenue Service is conducting an administrative investigation, not a grand jury investigation, and during the course of it they come across proof of the existence of other crimes but not tax crimes and for some reason—a quirk in the procedure of the handling of the case or in the fact that they may not be able to successfully prosecute the criminal tax case—that case cannot be forwarded to the Department of Justice, and the Internal Revenue Service ironically cannot share that information with either the FBI or the U.S. attorney's office.

The CHAIRMAN. If you have any suggestions about new legislation that will assist in this matter, I hope you will get it to the staff of the committee so we can consider it.

Mr. OLSEN. Those are matters, Senator, that are currently being discussed between the Department of Justice and the Internal Revenue Service, and on a working day basis those problems are shared with the Criminal Investigation Division of the Internal Revenue Service and the Tax Division. I think when we get to a point where we can identify procedurally and substantively how we can put together a legislative vehicle, we will give serious consideration to presenting one to the Congress.

The CHAIRMAN. If so, will you respond to questions here and testify before any duly constituted committee of the Senate?

Mr. OLSEN. Yes, Senator.

The CHAIRMAN. I think that is all the questions I have. I do not anticipate any special objections to you on behalf of the Senate, and we shall get your nomination to them soon under the rules of procedure here that we have.

I hope you enjoy your work with the Justice Department as Assistant Attorney General.

Mr. OLSEN. Thank you very much, Senator.

The CHAIRMAN. That completes our hearing. We stand adjourned.

[Whereupon, at 3:01 p.m., the committee adjourned, subject to the call of the Chair.]

BIOGRAPHIES

ANDREW J. KLEINFELD

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF ALASKA

Birth: June 12, 1945—New York, New York.

Legal Residence: Alaska.

Marital Status: Married, Judith Karen Smilg Kleinfeld 3 children.

Education: 1962-1966—Wesleyan University, B.A. degree. 1966-1969—Harvard Law School, J.D. degree.

Bar: 1970—Alaska. 1973—Massachusetts.

Experience: 1969-1971—Law Clerk, Hon. Jay A. Rabinowitz, Alaska Supreme Court. 1971-present—Private practice, Fairbanks, Alaska. 1971-1974—United States Magistrate, District of Alaska, (part-time).

ROGER MILTON OLSEN

NOMINEE, ASSISTANT ATTORNEY GENERAL (TAX DIVISION)

Birth: March 27, 1942—San Jose, California

Legal residence: Virginia.

Marital status: Married, Joanne Gordon, 1 child.

Education: 1960-1964—University of California, Berkeley A.B. degree; 1964-1965—University of Southern California, Los Angeles; 1965-1968—University of California School of Law, Berkeley J.D. degree; 1974-1976—George Washington University LL.M. degree.

Bar: 1969—California.

Experience: 1969-1972—Alameda County District Attorney's Office Deputy District Attorney; 1972-1977—U.S. Department of Justice Tax Division Trial Attorney; 1977—Hassard, Bonnington, Rogers & Huber Associate; 1978-1979—Wickham, Craft & Cihlar, P.C. Associate; 1979-1980—Wickham & Craft, P.C. Principal; 1980-1981—Sole Practitioner; 1981-1983—U.S. Department of Justice Criminal Division Deputy Assistant Attorney General; 1983—U.S. Department of Justice Special Counsel to the Associate Attorney General; 1983-1985—U.S. Department of Justice Tax Division Deputy Assistant Attorney General.

CONFIRMATION HEARING ON DANIEL A. MANION

WEDNESDAY, APRIL 30, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:10 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Biden, East, DeConcini, Metzenbaum, McConnell, Simon, Heflin, Denton, Specter, Laxalt, and Kennedy.

Staff present: Duke Short, chief investigator; Cindy LeBow, minority chief counsel.

OPENING STATEMENT OF CHAIRMAN STROM THUMOND

The CHAIRMAN. The committee will come to order.

We are meeting today to consider fully the confirmation of Mr. Daniel A. Manion to be circuit judge for the Seventh Circuit Court of Appeals.

Today's hearing is the second hearing on the nomination of Daniel Manion to be a judge in the Seventh Circuit Court of Appeals. The first hearing was held on March 12, 1986. Mr. Manion appeared at that hearing and responded to all questions that were asked. I was satisfied with the responses that Mr. Manion gave. However, after the first hearing, some concern was expressed by the Chicago Council of Lawyers as to whether Mr. Manion would be able to deal adequately with difficult legal issues which are routinely presented to the seventh circuit.

In that regard, I would like to read a letter I received from Mr. Eugene I. Goldman which I feel properly speaks to the conclusions reached by the Chicago Council. That letter reads as follows:

Dear Chairman Thurmond: I am writing in support of the confirmation of the nomination of Daniel A. Manion to serve on the United States Court of Appeals for the Seventh Circuit. By way of background, I have been a Democrat all of my life. For the last 7 years, I have served as a director and a member of the Executive Committee of the Washington Council of Lawyers which shares its origins and commitment to the public interest with the Chicago Council of Lawyers. I am also a great admirer of Senator Simon and contributed to his campaign for the Senate. I have also had the opportunity to work with Mr. Manion in defending a lawsuit in South Bend.

I believe that Mr. Manion is an excellent lawyer and would be a distinguished member of the seventh circuit. I have reviewed the Chicago Council letter to Senator Simon dated April 9, 1986, and note the Council's finding that Mr. Manion has a high reputation for integrity, conscientiousness, and fairness. He has excellent interpersonal skills, and the lawyers who work both with and against him like and respect him, that the majority of lawyers felt that he was a competent lawyer. A few

lawyers told us that Mr. Manion was an outstanding lawyer. All vouched for his forthrightness and his adherence to high ethical standards.

I believe that the Chicago Council's findings, including its findings that Mr. Manion has been found to be a competent and outstanding lawyer, are inconsistent with the council's ultimate speculative conclusion that Mr. Manion will have difficulty with the legal issues routinely presented to the Seventh Circuit.

I respectfully encourage the committee to vote favorably on the President's nomination of Mr. Manion. Very truly yours, Eugene I. Goldman, of the firm of Steptoe & Johnson, Washington, DC.

I feel confident that Mr. Manion is capable and qualified for the position to which he was nominated. However, Senator Biden, on behalf of the minority members of the committee, requested this second hearing. In order to accommodate my good friends and the able Senator from Delaware, I agreed to his request.

I have no further questions myself at this time and will be very pleased to call on the distinguished Senator from Ohio, Mr. Metz-enbaum.

Senator METZENBAUM. I think the Senator from Arizona was going to proceed, and if he would not mind going ahead at this point, I would just like to read a couple of my notes.

The CHAIRMAN. All right. The able and distinguished Senator from Arizona, Mr. DeConcini.

Senator DECONCINI. Thank you, Mr. Chairman, and thank you, Senator Metzenbaum. I appreciate that. Like everybody else, I have a dozen places to be.

I want to thank the chairman for acceding to the request of the Senator from Illinois and others of us who asked for this hearing. As I have said, I always start on the basis that the President should be able to nominate the men and women to the Federal judiciary that they choose. This is the philosophy I operated under when President Carter was here. Often his nominees differed with me on various philosophical issues that came before this body for confirmation. I did not hold those against them and hold those necessarily for them. I tried to judge on what I thought the person would be on the bench.

As we have discussed, Mr. Manion, this system can only work if the individual, once on the bench, operates under the constraints of our existing laws and in accordance with those laws. When I say laws, I mean both as passed by Congress and as interpreted by the Federal courts. If a judge does not operate under these constraints and precedents, if he believes he can make the laws or ignore precedents established by appellate courts, then our judicial system breaks down because there would be no consistency and no continuity. No one would be able to conform their actions to the law because the law would depend on what one single judge happened to say.

I think the position of a judge in our society is far more prominent and influential than anyone in this body. Your decisions are going to be recognized for a long period of time, and of course, those decisions of the court that you will join and the Supreme Court, as much as I may disagree with them or you disagree with them. I am not here to lecture, and I do not want it to be misinterpreted in my statement to you. The concern that I have is whether you will operate under these types of constraints based on your very strong philosophical beliefs, which I respect, that you have es-

poused during your period of time in public office and in private life, and in some of the organizations you have belonged to. I hope that you will be able to reassure us today that these concerns are unfounded, that you would not carry to the bench the feelings and translate them into your decisions or public statements from the bench of your criticism of the Supreme Court on a number of occasions and decisions, which I must say, I happen to agree with you in some of those criticisms of the Supreme Court. I have attempted on a number of occasions to support legislation that would change those, but it is a little different, as you know, having served in the legislature, being in the legislature and trying to change the law than it is sitting on a court.

Will you be able, Mr. Manion, to carry out the decisions of the Supreme Court, even though you earnestly disagree with them? And will you enforce the laws passed by Congress, even though you may believe that they are not good public policy?

**TESTIMONY OF DANIEL A. MANION, OF INDIANA, TO BE U.S.
CIRCUIT JUDGE FOR THE SEVENTH DISTRICT**

Mr. MANION. Thank you, Senator DeConcini. I very much appreciate your statement. I can say I totally endorse it.

The CHAIRMAN. Excuse me. I forgot, Mr. Manion. I believe you were sworn before, but if you do not mind, I will swear you again.

Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MANION. It will.

Excuse me, Senator. I totally endorse your statement. I know the difference, having served in the Indiana State Senate, the difference between a legislator and a judge. Many times we vote on things because of a constituency or because of a certain thing that we believe should take place in a State effecting State law. You gentlemen here, of course, have to effect the Federal laws, and I recognize very much the authority that you have. I recognize the legislative authority distinguished from the judicial authority.

I do not like the idea of an activist judge changing the law. A law that has to be changed has to be changed in the legislature, and I think that if a judge is going to rule on a case and there is a Supreme Court precedent on that same set of facts and on that same issue, he is bound to follow it. Stare decisis is the order of our legal practice, and anyone who tries to avoid that by initiating his own or her own feelings or philosophy as a judge is violating that process. And I respect it too much to do that.

Senator, I endorse your statement and intend to follow it.

Senator DeCONCINI. Mr. Manion, if you had a case before you, hypothetically now, and I am not going to ask you for how you are going to decide on it. We went through that round when Sandra O'Connor was here. Some members would have liked to nail her down on how she was going to rule. And we have had that attempt before, and I do not want that to be an interpretation of what I am asking you.

But hypothetically, if you had a decision, say, on the civil rights laws of this country that the Congress had passed that the Supreme Court had ruled on that issue, or a labor relations appeal

from the NLRB that the Supreme Court had ruled on, and even though you felt very strongly and had expressed that feeling, or even if you had not expressed that feeling, felt very strongly that that decision was wrong—not only wrong, it was bad—and that you might have been active in the State legislature or in your profession to try to change that, will you be bound by that decision if those were the set of circumstances that were presented before you?

Mr. MANION. Senator, given those set of circumstances, I am bound by the Supreme Court decision. I might criticize it, but I would follow it. And I would follow it because it has already been decided by the Supreme Court; appellate courts are bound by those decisions.

Senator DeCONCINI. Thank you.

Thank you, Mr. Chairman. I have no further questions.

The CHAIRMAN. I might ask you this: Sometimes the Supreme Court's decision is overruled, though. And if the Supreme Court has decided a case a certain way, like *Plessey v. Ferguson* in 1986; it was overruled in 1954 by the Supreme Court. You would feel free, I presume, to use your own judgment if you felt that the case needed a rehearing and a question were raised from that viewpoint. Not that you disagreed with the actions of the Supreme Court necessarily, but I presume you would be free if you saw fit to take a position that would allow the court to go up for appeal.

Mr. MANION. Yes, Senator. *Plessey v. Ferguson* was overruled by *Brown v. the Board of Education*. And of course, that overruling was done by the Supreme Court. It was not done by a lesser court.

I would say again, that if I disagreed with a Supreme Court decision, I could not overrule it. Frankly, a lesser judge could not, anyway. But I would not write an opinion contrary to it. I might criticize it. An opinion could be obsolete, for example. There could be a serious problem or a defect. I would try to point that out in an opinion, but I would follow the precedent as long as the facts were the same and it was the same issue.

If the facts were different, if there were a different set of issues before the court and there was not a precedent that was on point, then I think there could be some deviation.

The CHAIRMAN. I presume that you would take no step, though, to prevent an appeal if the litigants wanted to appeal the case up to the Supreme Court and try to get them to reverse their decision? In other words, you would take no step to try to bar that course.

Mr. MANION. Right. An appeal, of course, can be taken by either party so regardless of where I rule—

The CHAIRMAN. I just want to leave that open now because people do have a right to take cases to the Supreme Court and ask the Supreme Court to reverse those decisions.

Mr. MANION. That is correct.

The CHAIRMAN. And as a member of the trial court or a member of the circuit court, I presume you would not try to block or interfere with any appellate process if the litigant wanted to do that.

Mr. MANION. Certainly not, Senator. I think that right of appeal is set. Obviously, the Supreme Court has to grant certiorari.

The CHAIRMAN. OK. Thank you.

You may proceed.

Senator DeCONCINI. Mr. Chairman, I am finished with my questions. I thank the chairman and the Senator from Ohio.

The CHAIRMAN. The distinguished Senator from Kentucky, Mr. McConnell.

Senator McCONNELL. Thank you, Mr. Chairman. I was here during the first hearing and have no questions to ask of the nominee. I am satisfied of his credentials unless I hear otherwise during the course of the hearing today. So I will decline to ask any questions.

The CHAIRMAN. Yes. The distinguished minority member of the committee, Mr. Biden.

Senator BIDEN. Thank you very much, Mr. Manion, welcome.

Let me ask you something related to qualifications. Does the Indiana Senate confirm judges to the Indiana court or are they elected?

Mr. MANION. Are you talking about the Indiana Supreme Court?

Senator BIDEN. Any court.

Mr. MANION. Well, it varies, Senator. The Indiana Supreme Court, justices are appointed. A judicial selection committee selects, I believe, three nominees. The Governor selects the ultimate person from the nominees.

For circuit courts, the judges are all elected. A circuit court has jurisdiction over any given county. There are superior courts within the county that are appointed or elected, depending on the county. They vary. There are some that are elected; some are selected through some sort of judicial selection process.

Senator BIDEN. As a State senator, though, you were not in the position of having to advise and consent on judicial nominations?

Mr. MANION. No. We did not have that opportunity, Senator.

Senator BIDEN. Mr. Manion, let me ask you a few questions. In July 1965, in a speech to the American Bar Association, the Attorney General of the United States, Mr. Moore, assailed the extension of guarantees of the Bill of Rights to States, a process that began with the Supreme Court ruling in 1925, as you well know, stating that the first amendment applied to State actions.

The Attorney General said, "It is politically violent and constitutionally unsound to bind the States to the Bill of Rights protections and privileges through the incorporation in the 14th amendment due process clauses," the so-called incorporation doctrine.

Do you agree with the Attorney General that the incorporation doctrine is constitutionally unsound?

Mr. MANION. Senator, in the past, and I would say it is probably the more distant past, I have been critical of the incorporation doctrine. I felt that there were certain things that usurped State power. I think, however, that over the years this has become so integrated into our judicial decisions that I think it would be very difficult to overrule this incorporation doctrine, and certainly not by an appellate court.

I think the Supreme Court could dissent it somewhat if it so chose, as it did incorporate it. As you know, that was a gradual process over a series of cases, even using the penumbras for the right of privacy. So there was a process of evolution, if you will. That is another criticism that they have thrown at me. There was

a process of evolution of this and I think the Temperance Society is pretty well ingrained into our political process now.

The Chairman: Senator Wilson, Senator Burton has an urgent appointment. Would you yield?

Senator Burton: Yes.

The Chairman: Senator Burton.

Senator Burton: Thank you, Mr. Chairman, and I want to thank you, Senator Wilson, for listening.

I just want to make a statement in support of the nomination. I believe the man is completely qualified by his background and experience and will serve with great distinction as the Federal judge. He has been elected, he is a 1910 graduate of the University of Notre Dame, and a 1912 graduate of the Indiana University School of Law. After graduation, he practiced law with the Office of the Attorney General for the State of Indiana, and he served as counsel for the South Bend, IN, law firm of Davis, Wilson, Morrison, Kupper & Simpson, first as an associate and then as a partner.

The reason I wanted to express my support for this gentleman is that I know him and his family, particularly his deceased father who was one of the most respected men in our life who served long and honorably as the distinguished dean of the law school at the University of Notre Dame. I had the honor of sharing the podium with Dean Wilson on many occasions. He had a wonderful spirit in which he would deal with any sentence of the President in the Declaration of Independence, the way you got all together with him and he would interpret justice for 1 or 20 minutes with one of those phrases, "All men are created equal, endowed by the Creator" or others. And he did it in the most loving and generous way. He always inspired his audience, inspiration of their political orientation or whether they were liberal or conservative.

I just wanted to say that as a matter of conscience and to say that from what I know of him, he has a high degree of integrity, conscientiousness, fairness, and legal ability, all important, all virtues for the bench and especially characteristics which he inherited from his distinguished father.

I am generally pleased that Senator Tager and Senator Ford recommended him and that President Reagan nominated him to serve the country as a member of the judiciary.

I thank you, Senator Wilson and Mr. Chairman, for letting me make this statement.

The Chairman: Thank you very much.

I'm now going, Senator Wilson.

Senator Wilson: Thank you.

Back to the Temperance Society, Mr. Wilson. What were your objections to the Temperance Society?

Mr. Wilson: I think at the time it was the difference between the Federal Government and the States. I felt that there was a great deal of political activity in order not to offend them now.

Senator Wilson: Can you tell us what some of those States were that opposed you that were being talked into?

Mr. Wilson: To be honest with you, Wilson, it has been a long time since I have really looked into this and personally, but I can tell you that not particularly there but as much as the philosophy of the Federal Government versus State government. I felt that

States had autonomy and I liked the idea of retaining it as much as possible. I realize that with the incorporation doctrine having been ingrained in our judicial system and its progress through the courts, that this is probably more hindsight than anything at this point.

Senator BIDEN. Do you think in retrospect that there would be anywhere near the progress we have made on civil rights had there not been an incorporation doctrine applying the 14th amendment and other amendments to the States?

Mr. MANION. I think in some States progress would have been slower, and maybe it would have been more difficult.

Senator BIDEN. In retrospect, do you think it was a wise thing for the Federal Government to have done what it did with regard to intervening and/or overriding State laws?

Mr. MANION. You mean the Federal judiciary?

Senator BIDEN. The Federal judiciary giving the Federal Government the power to override.

Mr. MANION. Right. Through its cases. I think if I were to look at the result, I would say I concur in the result. If I were to look at the process, I think my objections at that time were concerned with the States and the federalist idea and the States retaining their autonomy.

Senator BIDEN. One more question on the incorporation doctrine. You said, I believe, and I am paraphrasing, in your answer to me that you thought that it was so ingrained—I think that was the phrase or something like that.

Mr. MANION. Something like that.

Senator BIDEN. In the process now that it could not be easily changed and, obviously, the Supreme Court could "deincorporate," but you did not think that would happen.

What would you like to see? If you were before the Supreme Court, would you in fact, as a member of the Supreme Court, move to deincorporate, if you will?

Mr. MANION. I have no idea, Senator.

I think what each judge has to do is remember that when a case comes before him or her, he is dealing with two entities, he is dealing with two people—

The CHAIRMAN. Just a minute.

I am just wondering if that question does not go to the point of what he will do if he is a judge?

Senator BIDEN. Well, I think it is such a basic philosophic question—

The CHAIRMAN. You asked him how he would—

Senator BIDEN. I am not asking him to rule on any case.

The CHAIRMAN. In other words, you are bringing out a point here that would practically ask him how he is going to rule on the cases.

Senator BIDEN. Well, in a general sense, I would agree to that if you would agree that if I asked him would he in fact uphold the Constitution and ask him how to rule on a case. I am asking him about a doctrine that—

The CHAIRMAN. Well, I think he said he was standing by the decisions.

Senator BIDEN. Well, I understand that, Mr. Chairman.

The CHAIRMAN. Even though he did not agree with them.

Senator BIDEN. Yes. Now, I want to know whether or not if he agreed with them—you know, obviously part of what the stake here, Mr. Chairman, is not only whether or not what Mr. Manion believes, but whether or not Mr. Manion is believable. And I am prepared to believe he is believable.

But part of the way for me to find out how believable he is is to find out whether or not he would in fact, given another—it is easy to say, when you are in a lower court, as we found with every judge in the Carter administration and this administration, they come up and say have you ever found anybody who said they would not uphold the law? I have never heard anybody down there say they would not uphold the law, whether they are some whacko liberal or some right-winged conservative, or anything in between. Everybody says they will uphold the law.

And what I am attempting to do, and I think fairly, Mr. Chairman, is pursue something that is in great controversy in this country, particularly as it relates to the ideological disposition of members on the left and the right. As to the nature and extent, I cannot keep it down. If you can figure out how to do it, I am willing, you know.

I will tell you what. I am not trying to trap you. I am trying to get a sense of where you are because obviously it is critically important to at least me whether or not—do you believe in the doctrine of original intent as put forward by—no, that is not the case. I mean we had an Attorney General who made a scholarly speech on the notion of original intent. The new doctrine has been sort of put into the law. I mean into the debate.

But do you believe in the doctrine of original intent as put forward by Mr. Meese?

The CHAIRMAN. If you want to answer that, go ahead.

Mr. MANION. Well, I do not know what Mr. Meese said. If you can tell me, then I will tell you whether I agree with it.

Senator BIDEN. Well, that is unfair of me to do. I will send you a—I am not being facetious—I will send you a copy of the speech.

But as I understand it—

The CHAIRMAN. Senator, I do not want to interrupt you again. But I would not be asking him if he agrees with Mr. Meese or agrees with anybody else. He is here in person. He can answer your questions.

Senator BIDEN. All right.

The CHAIRMAN. But to compare the Attorney General, who has probably recommended his appointment, and ask him if he agrees with the statements he has made, he may or may not. But what has that got to do with him? He is here in person to answer your questions about the law and the Constitution.

Senator BIDEN. Well, then it will just take a little longer.

The reason I mentioned Mr. Meese is he is the only one who has articulated the doctrine of original intent. And that is why I would mention it. Just like if I was going to suggest to him does he believe in Jerome Frank's notion of gastronomic jurisprudence.

Mr. MANION. I have not heard of that one either

Senator BIDEN. Well, you should read "Law and the Modern Mind." You know, I thought that you—most people would go into a circuit court of appeals and would have a deep understanding of

American jurisprudence. That is something that has been debated extensively by legal scholars. And that is the context in which I asked it.

But rather than you and I argue, Mr. Chairman, which we seldom do, let me say do you believe that in fact the Constitution should be taken in its literal sense? The essence of the doctrine of original intent, Mr. Meese says that "The way that a judge should read the Constitution is precisely as it is written."

Do you believe that?

Mr. MANION. I think we always have to look at how the Constitution is written and the wording. The Constitution always has to be read the way it is written, and I would not do otherwise.

But, as we all know, the Constitution has been interpreted over the years, and that language as it is written, has been given interpretation. And this gets back to the issue of *stare decisis*. If there is a Supreme Court decision that has taken the Constitution as it is written and interpreted, I have to follow that decision.

Senator BIDEN. You said at your first hearing that "Personally, I think it's unfortunate that there are limitations on any kind of promotion of God in schools."

What is it that is unfortunate about that? Why do you think that is unfortunate?

Mr. MANION. I think it is unfortunate because, in our own Indiana Constitution, it refers to Almighty God, and the Constitution also was written in that context.

I think the problem—and this again is a legislative thought process what my constituency feels, that one of the problems in schools is that there is not enough, we will call it devotion. We have been so careful to get away from ethics in teaching that we have lost something important that I think was ingrained—if I could use that word again—in the development of our own State. And in the Declaration of Independence.

I realize that there have been Supreme Court decisions that have interpreted certain things. I am obligated to follow those regardless of my own personal beliefs.

Senator BIDEN. You said that the Supreme Court decision in this area—that you accept the Supreme Court decision in this area, but you have also said that the Supreme Court's original decision banning State laws authorizing prayers in schools was wrong and that it was precedented fallaciously. It was from one of your appearances on "The Manion Forum."

You indicated that the decision was wrong because the establishment clause of the first amendment applies only to the Federal Government and not to the States.

Now, do you still hold that view?

Mr. MANION. I am not familiar with that statement. Do you know when that was made?

Senator BIDEN. Yes. It was TV program No. 334. The date I will have to dig up for you and get for you. And it was on page 2 of the transcript from that TV show. But I will get you a copy of it. I do not know the date.

Mr. MANION. I had forgotten I had done a TV show.

My father had a television show in the late sixties called "The Manion Forum," so it must have been then.

Senator BIDEN. Well, I had a copy of it here. It is a copy.

But, at any rate, do you in fact—do you believe the decision was wrong?

Mr. MANION. First of all, Senator, I do not recall that program, and I would have to read the whole context.

Senator BIDEN. Well, let us start from scratch.

Mr. MANION. Sure. I would rather do that.

Senator BIDEN. Do you believe their decision on school prayer was wrong?

Mr. MANION. As I said before, there were certain things that I had been critical of in the past, and I do not remember that one.

As far as the decision on school prayer, I disagreed with it. That does not mean that I have analyzed that decision, I cannot dissect it and tell you. I did disagree with it as did frankly most people in my constituency when I was in the senate.

Senator BIDEN. Now, can you tell me as a lawyer why you disagree with it? On what legal grounds?

You disagree with it, I assume instinctively, because you——

Mr. MANION. Yes; that is right.

Senator BIDEN. Now, can you tell me was there a legal basis for your disagreement?

Mr. MANION. First of all, the disagreement was personal. I want to establish that. This is not something that I decided based on any great legal analysis. I just disagreed with it.

When the Constitution says no State shall establish a religion, I felt that that meant not establishing any particular religion. I always have read, and a lot of legal scholars have stated that certain States, when our country was organized, did establish religions. And this was what the first amendment was trying to prevent.

As you know, there are very vociferous dissents by Justice Rehnquist, by Justice Berger, Justice White on occasion, where they discuss this in our history, and what is and what is not the establishment of religion.

Senator BIDEN. I am not suggesting that it is somehow crazy to disagree. I am trying to understand your legal philosophy.

Mr. MANION. I cannot say it any better than they said it. But those are some of the legal reasons that I feel are the foundation of our country, that does not say that the establishment of a religion is the same as saying a prayer in school.

Senator BIDEN. Are you persuaded that the guarantees of freedom of religion contained in the first amendment apply to the States?

Mr. MANION. I am now. I think that is pretty well established.

Senator BIDEN. And would you have—do you believe it should be overturned even if you could?

Mr. MANION. Well, that is up to you. I do not have that authority.

The CHAIRMAN. Well, Senator, ask him what do you do if he became a judge? Just a minute, I do not think you are required to answer any question as to how you would rule as a judge.

He is asking you if a certain decision should be overturned.

Senator BIDEN. As a lawyer.

The CHAIRMAN. That is a matter that——

Senator BIDEN. How you are deciding a case as a lawyer.

Mr. MANION. As a personal opinion, I would say as a lawyer, you in the U.S. Senate can do certain things legislatively to possibly change that and other decisions of the Supreme Court. And that is the way it should be done. Not in the courts.

Senator BIDEN. You have indicated that, as a judge, you would follow law. But I also note that you felt that—let me back up.

Mr. MANION. Are you reading that transcript again?

Senator BIDEN. I have got about 50 transcripts of things you said. I have got a lot of them to read.

Mr. MANION. OK.

Senator BIDEN. But I will try to do it another way rather than read it to make it easier on you.

The late Larry McDonald wrote a book "We Hold These Truths," and there was a commentary by you in "The Manion Forum No. 1172," on March 27, 1977, where you said, "It's one of the finest summaries of the history of our country that I have ever read." Date, March 27, 1977.

And the book says that a Supreme Court decision "is not law at all but only the rule that is binding only on the parties involved in the case and is enforceable only on that limited group if the executive and legislative bodies choose to enforce it." That is McDonald's point.

Now, I do not want to suggest that you hold—what I want to know is did you mean what you said, or was it hyperbole?

Mr. MANION. I do not remember that.

Senator BIDEN. That it was one of the finest summaries of the history of our country.

Mr. MANION. I have absolutely no recollection of that.

Senator BIDEN. Well, I just refreshed your recollection.

Mr. MANION. No, you have not. You have read something that I apparently said. I do not remember saying it nor do I remember the book.

Senator BIDEN. Well, I will get you a copy. Maybe I can hand it down to you now.

Mr. MANION. Sure.

Senator BIDEN. If the clerk will see that this gets on down.

While you are doing that, we can—obviously, again, this shows not just to whether or not what someone's ideology is while you are reading it. It goes to the question of whether there is any understanding of the Constitution. God bless him, but clearly, in my view, the late Congressman McDonald had no understanding of the Constitution as evidenced by that "as to what in fact the Supreme Court ruling is."

And I just want to know if you agree with that summary? Because if you do, it obviously goes to the issue of the degree to which we agree on your understanding of the Constitution.

Mr. MANION. This is apparently an interview that I had with Senator McDonald on "The Manion Forum."

Senator BIDEN. Yes.

Mr. MANION. And it makes reference to his book.

Now, as far as what is in the book and what I agree or disagree with, I guess that is what you are asking me.

Senator BIDEN. Yes.

And you said in there you think it is the finest—"the finest summary"—I want to get it right here so I do not misquote you.

Mr. MANION. It says that my personal observation is that it is one of the finest summaries of the history of our country, what has happened in the past, and what has happened to us, and what we have to do about it.

Senator BIDEN. Let me just get to this because it goes not to how you would rule on a case, but our understanding of your understanding of the Constitution.

Mr. McDonald, who, as I said, was a guest on the show, and a member of the John Birch Society, indicated that in the broadcast saying that the McDonald book is the most concise, purely printable and readily understandable digest of the formation, operation, and recent miscarriages of constitutional construction I have ever seen.

You responded—that was your father's statement—you responded by saying, "My personal observation is that it is one of the finest summaries of the history of our country that has happened in the past," which you just read, "what happens to us and what we have to do about it."

And you concluded, on the April 3, 1977, broadcast by saying, "We hope other people in the Congress will read your book. We hold these true. So that we will realize that solutions to our problems are available."

Now, set forth are—what I am about to read you are some of the solutions that were offered in the book.

Mr. MANION. I think, Senator, if I may interrupt, all I am really saying here, and I am sorry I do not recollect this, but it says that I am observing that it is a good history, and I am requesting the Congress to read it because, in that book, there are certain solutions that Congress can make.

You have apparently read it. I do not know whether you are going to ask me about whether I agree with those solutions or would recommend that you do them, but that is the extent of it. It has nothing to do with my judicial activity or what I would intend to do as a judge.

Senator BIDEN. Well, that is what you say you meant, "My personal observation is that it is one of the finest summaries of the history of our country that has happened in the past and what is to happen to us and what we have to do about it."

It seems to me a reasonable man can imply from that that you agreed with the basic tenets of the book.

Mr. MANION. Well, in interviewing someone, who is also a Member of Congress, I try to give some deference to that too. And—

Senator BIDEN. Look, I understand. All I am trying to get from you is I understand if I had a TV show or a radio show, there are times when I would engage in some hyperbole to promote things.

And what I am trying to get from you is was it hyperbole or did you mean it, because I have real deep trouble with it.

Mr. MANION. Well, I do not remember the book, and you are apparently going to read me some of the excerpts from it and ask me whether I agree or disagree.

Senator BIDEN. Well, I will not do that. I will recommend you reread the book. But he does things like he talks about return to the original Constitution. He says that pleading for reestablishing of the Constitution of Government was ordered by the Constitution in 1789. It is not an advocate of a return to a simpler world. Rather, it is the suggestion that the Nation climb up and stand on high ground. Once again, the Government system ordained by our Constitution is appropriate for our Nation today as it was at the time it was in 1789, even more desperately needed now.

And then he goes on and talks about the meaning of due process, which is an unusual interpretation of due process. And he interprets the first amendment. He interprets the commerce clause, the 14th amendment, the separate but equal clause. And it goes on. I will not take you through it now.

Mr. MANION. Senator, I can assure you any interpretation that I make of the Constitution and any part of it is going to be based on Supreme Court decisions, not on what Congressman McDonald said.

Senator BIDEN. The Senator says it answers everything. That is true, assuming you understand the Constitution.

And one of my purposes here is to find out the degree to which being put on one of the most important courts in the United States of America, whether or not you understand the Constitution.

Now, we can do it one of two ways. We can go through the Constitution or, to make it easier, which I thought and we will not do this way if it is useful for you, is to take your statements as to what you believed to be accurate interpretations of the Constitution. Accurate interpretations of the Constitution. That is the only way I know as a Senator the degree to which you understand and how you view it.

You and I both know a law degree does not confer upon someone any particular expertise and knowledge of the Constitution. And it should, but it does not. So you do not start, nor does any other nominee in my view, start with the assumption that they are, in a scholarly sense, cognizant of and understanding of the basic tenets of the Constitution. It is something we ask about. It is not interpretation of the cases. Because what I have before me is statements by you lauding people's views of the Constitution. The people's views and interpretation when read, I believe, I hope when you would read them, you would say, "That is crazy. It couldn't mean that."

I am not trying to be argumentative with you. I am trying to understand what you think. And I have taken too much time. Why do I not yield and come back to this.

The CHAIRMAN. Let me ask just one question.

Senator BIDEN. Sure.

The CHAIRMAN. As I understood your position, and if I am in error right now, you stated that you believe the Constitution meant what it says. In other words—

Senator BIDEN. No, I did not say that, Mr Chairman.

The CHAIRMAN. No, I did not say you said it.

Senator BIDEN. Oh, sorry.

The CHAIRMAN. I am trying to see if this is his feeling, that the Constitution means what it says and says what it means. However,

you would abide by the interpretations of the Supreme Court on the Constitution?

Mr. MANION. Correct, Senator.

The CHAIRMAN. And although his feelings may not be in accord with the decisions of the Court, as a judge, if he abides by it, what more can you do? If he has got a conscience, he has got a right to think what he pleases, whether it is as a judge, then he will abide by the Supreme Court decisions.

Now, what else could you do?

Senator BIDEN. We can find out whether or not he understands the decisions.

The CHAIRMAN. Well—

Senator BIDEN. That is what this is all about, Mr. Chairman.

I am not being smart, I am being serious.

The CHAIRMAN. Well, this man is a lawyer, he has practiced law, he is an able lawyer. And your interpretation of the Constitution might be different from his. But neither one of yours will count.

What will count is the Supreme Court's interpretation of the Constitution, and that, he says he will abide by. Now, what else can you do?

Senator BIDEN. What you can do is find out whether or not he understands what the Supreme Court decisions are, not the Constitution, the Supreme Court decisions. That is what I am trying to do.

Why do I not yield in deference to my colleagues and come back to my questions because I have got a bunch of them. And I apologize, gentlemen.

The CHAIRMAN. The distinguished Senator from North Carolina.

Senator EAST. Mr. Chairman, I support the nominee, and I would like to reserve any questions until I hear the distinguished panel here of dissenters and then I would like to ask some questions if I might. So I will defer to the minority.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Mr. Chairman, Senator Simon was here before me. I would like to have him recognized.

The CHAIRMAN. Senator East, you say you have no questions?

Senator EAST. Not right now.

The CHAIRMAN. All right. The distinguished Senator from Illinois, Mr. Simon.

Senator SIMON. Senator Metzenbaum was here before me.

The CHAIRMAN. The distinguished Senator from Ohio, Mr. Metzenbaum.

Senator METZENBAUM. Maybe, Mr. Chairman, it might be appropriate if we just self-impose upon ourselves a 10-minute rule, and if I go more than 10 minutes, you could tell me so nobody will have to wait too long.

The CHAIRMAN. I think that would be a good idea.

Senator METZENBAUM. Mr. Manion, you coauthored a bill which would have permitted donated copies of the Ten Commandments to be posted in public elementary and secondary school classes, is that correct?

Mr. MANION. Yes. I believe it was in 1981. I do not remember the date, but there was a bill introduced to provide donated copies to the public schools, and I did support that.

Senator METZENBAUM. Well, did you introduce it? Were you the main author?

Mr. MANION. No, I was not.

Senator METZENBAUM. You were one of several?

Mr. MANION. I think there were quite a few. As a matter of fact, there may have been 20 or 25 cosponsors.

Senator METZENBAUM. And does not the bill clearly contravene the Supreme Court decision which had been handed down just 2 months earlier overturning a similar statute in the State of Kentucky?

Mr. MANION. As I recall, the author did introduce this bill, and the Supreme Court ruling had come down on the Kentucky case. As I recall, this bill was in effect a legislative protest of that.

Senator METZENBAUM. Well, it was a bill, Senate bill No. 245.

Mr. MANION. I think the author was Senator McDonald, if I am not mistaken.

Senator METZENBAUM. Let us talk about what it said.

Teachers in public elementary and secondary schools may display copies of the Ten Commandments on the walls of public elementary and secondary classrooms whenever a copy is donated for this purpose.

And then,

Each copy of the Ten Commandments shall be framed and shall measure no more than 16 inches wide and 20 inches high. Below the last commandment and in print no less than one-third and no more than one-half the size print used for the Ten Commandment shall appear verbatim a notation concerning the purpose of the display as follows:

The Ten Commandments are western civilization's legacy from the Jewish people. A representation of the Ten Commandments is displayed in the United States Supreme Court. This universal document was instrumental in shaping the development of the institutions and traditions of our civilization. Secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of western civilization and common law of the United States. This document represents only one version of the Ten Commandments.

All of that had to be printed on what was to be posted, and then,

If this section is determined to be unconstitutional, all copies of the Ten Commandments displayed by authority of this section shall be immediately removed when the judgment becomes final.

And then,

In the event any Indiana public elementary or secondary school system or its representatives is subject to litigation for carrying out the provisions of this chapter including the posting or nonposting of the Ten Commandments, the State of Indiana shall bear all legal fees and costs resulting therefrom.

Now, then, Mr. Manion, the Supreme Court had just prior to this spoken on this issue, 2 months earlier in fact.

Mr. MANION. I think it was a Kentucky case.

Senator METZENBAUM. Yes, a Kentucky case. Let us take a look at what the Court said. This case was a petition for a writ of certiorari in the Supreme Court of Kentucky.

It held,

A Kentucky statute requiring the posting of a copy of the Ten Commandments purchased with private contributions on the wall of each public school classroom in the state has no secular legislative purpose and, therefore, is unconstitutional, violating the Establishment Clause of the First Amendment.

It goes on to say that while the State legislature required the notation in small print at the bottom of each display, that the secular

application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western civilization and the common law of the United States, that such an avowed secular purpose is not sufficient to avoid conflict with the first amendment.

It then states that whether or not the posted copies are financed by voluntary private contributions is immaterial, for the mere posting under the auspices of the legislature provides the official support of the State government that the establishment clause prohibits.

Two months after that, there were not 50 cosponsors that I see. The cosponsors that I see here are McDonald, Sinks, Worman, Ugsberger, Brankibaker, Bosmer, Butcher, Corcoran, Costis, Dunbar, Hessian, Jessip, Justice, Manion, Miller P., Snowden, Marvin, and Creycraft.

The question, Mr. Manion, is, How could you, as a member of the legislature, introduce a proposal that you knew had been held unconstitutional just 2 months before?

Mr. MANION. Well, first of all, I did not introduce it, and second, as I stated earlier—

Senator METZENBAUM. What do you mean you did not introduce it?

The CHAIRMAN. Just a minute, let him answer now.

Senator METZENBAUM. Well, I know. He says—

The CHAIRMAN. Let him answer. You asked a question. Let him answer.

Mr. MANION. Senator McDonald introduced that legislation, and he asked for cosponsors. I obviously cosponsored it along with others, and frankly, in my opinion, if it is nothing else, it is an endorsement of Justice Rehnquist's dissent, that this is part of the history of Western civilization and would have been a very educational and beneficial thing to post in the schools.

As a legislator, I exercised that prerogative.

Senator METZENBAUM. Do you think that as a legislator it is your prerogative to introduce a bill that you know is unconstitutional?

Mr. MANION. I do not know what the distinctions were between our bill and that bill.

Senator METZENBAUM. There were none that I know of. Do you know of any?

Mr. MANION. I do not remember the distinctions.

Senator METZENBAUM. It provided for private financing. Your bill provided for private financing.

Mr. MANION. Yes. It was certainly an attempt to do exactly what, I guess, the Supreme Court said was not sufficient, to make it a secular document and make it a historical document as opposed to a religious document, and I would say that personally I did, at that time, agree with Justice Rehnquist's dissent.

Senator METZENBAUM. At your earlier hearing, you were asked about another bill you coauthored which would have allowed school boards to require teaching creation science along with evolution science in the public school.

Then you said you believed the kids in the high schools should have the benefit of evolution without the intervention of God and creation science.

Are you aware that a district court has already ruled that the teaching of creation science "has no scientific factual basis or legitimate educational purpose" and then, "the only real effect is the advancement of religion"?

Mr. MANION. I was not aware of that.

Senator METZENBAUM. But if you had been aware of it, would you still have gone forward and introduced the bill allowing school boards to require the teaching of creation science?

Mr. MANION. No. I would have tried to tailor that bill—even though, again, I was not the lead sponsor—I would have tried to tailor it so that it did meet the requirements of the court of appeals or the Supreme Court.

You said a district court. Did you mean court of appeals or district court?

Senator METZENBAUM. The information that was given to me, Mr. Manion, is a district court.

Mr. MANION. District court. I was not aware of that.

I think there was a court of appeals opinion later on.

Senator METZENBAUM. To the same effect?

Mr. MANION. Yes. And I would have tailored it to that if I had known about it.

Senator METZENBAUM. Now, you endorsed a book called "We Hold These Truths" by Larry McDonald, and you said, quote: "One of the finest summaries of the history of our country." Had you read the book?

Mr. MANION. No. We just went over that with Senator Biden.

Senator METZENBAUM. I am sorry.

Well, had you read the book?

Mr. MANION. I do not know. I do not remember it.

Senator METZENBAUM. But you saw fit to endorse it as one of the finest summaries of the history of our country?

Mr. MANION. When I was interviewing Congressman McDonald, I guess I said that. That is what it says here.

Senator METZENBAUM. Well, in that book it says that a Supreme Court decision is not the law of the land. Perhaps Senator Biden has already asked you that?

Mr. MANION. Yes. We have been through that.

Senator METZENBAUM. Well, let me ask you: Do you think that a Supreme Court decision is the law of the land?

Mr. MANION. I think that Supreme Court decisions, as they interpret the Constitution, do establish what we call stare decisis; and that those are precedents that do establish the interpretation for a particular issue or a particular part of the Constitution. Some call it the law of the land; that is a commonly used term. I would rather call it a precedent that must be followed in the courts.

The CHAIRMAN. I believe your time is up now, Senator.

Senator METZENBAUM. I will have some further.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. I would yield to my colleague from Massachusetts.

The CHAIRMAN. The distinguished Senator from Massachusetts.

Senator KENNEDY. Just on this question related to the Ten Commandments, what was your understanding if you would have been

able to get that particular law passed? Did you think that it would be the law?

Mr. MANION. The law of what? The State?

Senator KENNEDY. Of the State, yes.

Mr. MANION. Well, I think it——

Senator KENNEDY. Could we get yes or no? Did you think it would be the law of——

The CHAIRMAN. Oh, no. He has got a right to explain that.

Senator KENNEDY. It is my turn to question. I asked for a yes or no.

The CHAIRMAN. Let me tell you now——

Senator KENNEDY. I do not yield. I do not yield to you. I will not yield——

The CHAIRMAN. You have a right to ask the question, and he has got a right to explain——

Senator KENNEDY. And I will not be hammered down.

The CHAIRMAN. He has got a right to explain his answer.

Senator KENNEDY. I will not be hammered down either. He can answer it yes or no, and I will not be——

The CHAIRMAN. He can answer you, and he can explain his answer.

You can answer yes or no and then explain your answer.

Senator KENNEDY. That is fine. That is what I want. Yes or no. It is exactly as the Chairman says. Yes or no.

The CHAIRMAN. But you can explain that. You have got a right to explain that.

Senator KENNEDY. You can answer yes or no.

Mr. MANION. Could you repeat the question?

Senator KENNEDY. Did you believe that if that law that you co-sponsored was passed in both the legislatures of the Indiana Legislature that it would be the law in Indiana?

Mr. MANION. If it was passed by both houses and signed by the Governor and went through the normal process of determination by the attorney general before the Governor signed it and he signed it, then it would be the law.

Senator KENNEDY. Well, is it your understanding that a State statute can overturn the Supreme Court decision?

Mr. MANION. Not that I know of.

Senator KENNEDY. Well, did not the Supreme Court rule on this, just in your response to Senator Metzenbaum? Do you acknowledge that?

Mr. MANION. He explained to me it did rule on a *Kentucky* case; that is right.

Senator KENNEDY. So what would have been the effect of it even if the legislation had passed?

Mr. MANION. It may have been overruled. But I would have to compare the laws.

Let us assume that they are essentially the same——

Senator KENNEDY. It would have been overruled so it would not have had any effect. It would not have had any effect, then?

Mr. MANION. Once it was overruled, no.

Senator KENNEDY. Well, you acknowledged the *Kentucky* case, did you not? Did you know that that was in effect?

Mr. MANION. It seems to me we did.

Senator KENNEDY. Well, tell me, then, what do you understand the purpose of that legislative action would be?

Mr. MANION. Well, when it passed the Senate, and it passed 39 to 9, it was, I think, a statement more than anything else.

Senator KENNEDY. So it would not have had any application in terms of the State of Indiana.

Mr. MANION. It did not go any farther than the senate.

Senator KENNEDY. If it had passed. I am trying to find out how you view a Supreme Court decision and whether you recognize that the Supreme Court has ruled effectively on the identical issue. Here you cosponsor legislation. Obviously you would have supported it becoming law. And I am just trying——

Mr. MANION. The law——

Senator KENNEDY. The law of Indiana, did you not?

Mr. MANION. Yes, I think the law——

Senator KENNEDY. And what, then, is your understanding of what the effect of that statute would have been, if you had any understanding whatsoever?

Mr. MANION. If the Supreme Court overruled it, sure, it would be overruled.

Senator KENNEDY. Do you think even after your understanding of the *Kentucky* case that if this particular measure which you cosponsored, which bears your name, you think that that would have been the law of Indiana, even in the face of the Supreme Court decision?

Mr. MANION. Well, I think under the circumstances it would have had to have been challenged and then overturned or ruled unconstitutional.

Senator KENNEDY. But you did not believe that it was unconstitutional at the time.

Mr. MANION. Senator, I do not remember what we discussed at that time, but I think the motivation primarily was that it was an issue of what the senate, most of the senate, believed and it might have been termed as a protest.

Senator KENNEDY. You just indicated earlier that you were aware of the *Kentucky* holding. You just indicated in your earlier answer.

Mr. MANION. I think we were, yes, and I——

Senator KENNEDY. No. You were aware of the *Kentucky* holding. You drafted legislation which——

Mr. MANION. I did not draft that. Senator McDonald did.

Senator KENNEDY. It was drafted.

Mr. MANION. Yes.

Senator KENNEDY. Which you cosponsored?

Mr. MANION. I was one of the cosponsors.

Senator KENNEDY. And you believe that that would have been the law if it had passed the Indiana Legislature and had the Governor's signature on it, even though it was effectively on all floors the same identical case that the Supreme Court had ruled on; you think that it would have been the law in Indiana?

Mr. MANION. Effectively it would have to be declared unconstitutional, specifically.

Senator KENNEDY. But did you believe it to be constitutional or to be unconstitutional after the *Kentucky* holding?

Mr. MANION. I think, as we said, it was a protest to that Supreme Court decision. I do not remember the context of it, but I think that was one of the motives.

Senator KENNEDY. Do you believe it would have been constitutional or unconstitutional?

The CHAIRMAN. Senator, he has answered that.

Senator KENNEDY. I will take my time, Mr. Chairman.

The CHAIRMAN. He has answered that, and there is no use going over and over and over it again.

Senator KENNEDY. It is going to take a long time. This will be a long hearing.

The CHAIRMAN. He has answered that.

Senator KENNEDY. This will be a long, long hearing. Mr. Chairman, if I get—

The CHAIRMAN. I will be right here with you.

Senator KENNEDY. That is fine. Good. OK. Well, I expect to get some answers.

I just want to find out. Evidently this nominee believes that you can overturn a Supreme Court decision with an action in a State legislature.

The CHAIRMAN. Well, he said no. He said it was a protest. Did you not hear him say that?

Senator KENNEDY. If I can have—

The CHAIRMAN. He said it was a protest.

Senator KENNEDY. If I can have the rest of my time, how much time has the chairman used of my time?

The CHAIRMAN. I will give you all the time I used.

Senator KENNEDY. That is fine.

The CHAIRMAN. Go right ahead.

Senator KENNEDY. Thank you very much.

Mr. MANION. Senator, I think if we had passed, in the alternative, a resolution of the senate protesting the Supreme Court decision, that may have been the more proper way to do it than to pass this law.

Senator KENNEDY. Well, it troubles me that you believe a Supreme Court decision, evidently, can be either challenged in this particular way by a State statute.

Mr. MANION. No.

Senator KENNEDY. Well, I will let the record stand. If you want to add to it or subtract, as the chairman pointed out, you clearly can. But you understood the Supreme Court holding. You cosponsored legislation that ran in the teeth of that, smack on virtually all fours. You indicated that you believed that that would be the law in Indiana until that particular legislation would work its way up all the way up to the Supreme Court of the United States.

Now, that is what I have gotten from your responses.

Mr. MANION. There is one other problem there.

Senator KENNEDY. Do I state it accurately?

Mr. MANION. Well, I want to give one little fill-in here, and that is that the Indiana attorney general would also have to first rule, that in his opinion it is constitutional. And if he did so and recommended to the Governor, then the Governor would have to sign it. I do not think at that point it was expected that it would go forward. I think the bill did die at that point after the senate.

Senator KENNEDY. With all respect, they are not here as nominees for the court. You are.

Mr. MANION. I was not then.

Senator KENNEDY. You are.

Mr. MANION. I was not then.

Senator KENNEDY. You are now.

Mr. MANION. Yes.

Senator KENNEDY. It is worthwhile to find out what you thought of at that time.

Mr. MANION. That was what I thought.

Senator KENNEDY. And evidently you believed that the State statute would stand on all fours, that it had been overturned in the Supreme Court, it would be the law in Indiana until it worked all its way back up and was struck down again.

Mr. MANION. That is if it were passed.

The CHAIRMAN. Do you want to answer that? Go ahead and answer that.

Mr. MANION. What we were doing, I am quite sure, and I cannot remember all the context of any discussion. It was not that much, but it was protesting the Supreme Court, and it should probably have been more properly done with a resolution.

Senator KENNEDY. Well, that is just one area. I understand that with my time, Mr. Chairman—

The CHAIRMAN. No. You have several more minutes.

Senator KENNEDY. That is fine. OK.

Now, I am going to get back to the McDonald book and ask you questions about it, because like this, I want to understand your understanding of the Supreme Court decisions. I doubt very much whether there is any young person that goes into a civics class that would believe that a State legislature can overturn the Supreme Court decision with action, just as the Congress cannot. So if I can—

The CHAIRMAN. Well, he did not say it did.

Senator KENNEDY. I am making my statement on this. The record stands. So I want to review with you just some of your other views about the various institutional relationships and also about the—before we get to questions on this, let us go to the issue of the court-stripping question.

Mr. MANION. The court stripping?

Senator KENNEDY. Well, let us go to questions about court stripping. You know, eliminating the jurisdiction on different questions.

Mr. MANION. Article III?

Senator KENNEDY. Do you agree or disagree with the statement that, quote, "It is emphatically the province of the Judicial Department to say what the law is"? I mean, do you believe that if Congress does not like what the Supreme Court says the law is in a particular area, can it take away the jurisdiction of the Court in that area?

Mr. MANION. There have been discussion about that, as you know, Senator. There has even been laws introduced in the U.S. Senate. I think the authority for that has been article III, section 2 of the Constitution. That has really not been determined. Some say that would be unconstitutional, but I think there is at least an argument for removal of jurisdiction for certain issues. Mainly the

source of that from the Constitution, if you want me to tell you where that comes from, is article III, section 2(2),

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

That issue of exceptions that Congress shall make is what gives a possible authority for the Senate and the Congress to remove jurisdiction. That is a question that I do not think has been determined since very early cases. I recall in re McCardle, and frankly, I do not know what would happen now. I know there are a couple of bills before you or that have been introduced in the recent past.

Senator KENNEDY. In 1982, the Attorney General, William French Smith, wrote to the Senate Judiciary Committee regarding pending legislation to remove the Supreme Court's jurisdiction over certain first amendment cases. And I quote:

The integrity of our system of Federal law depends upon single courts of last resort having a final say on the resolution of Federal questions. The ultimate result of depriving the Supreme Court of jurisdiction over a class of cases would be that Federal law would vary in its impact among the inferior courts.

Do you agree?

Mr. MANION. Well, I think, first of all, the whole issue of removal of jurisdiction is in your bailiwick, in the Senate, in Congress, and not in the judiciary. And I would certainly not give any opinion about what I might think about that from a judicial standpoint.

Senator KENNEDY. Well, I know the time has gone on, but you were willing to express that in the Manion interview, were you not?

Mr. MANION. Interview with whom? Congressman McDonald?

Senator KENNEDY. "The Manion Forum." What is the date? March 27, 1977.

Mr. MANION. That is the McDonald interview.

Senator KENNEDY. Yes.

Mr. MANION. Is that the one you are talking about?

Senator KENNEDY. Yes.

Mr. MANION. OK.

Senator KENNEDY. And do you remember that issue being brought up during that discussion?

Mr. MANION. No, I do not.

Senator KENNEDY. You do not remember commenting on the Supreme Court?

Mr. MANION. In the McDonald interview?

Senator KENNEDY. No, this is not. This is the other. It is "The Manion Forum."

Mr. MANION. Well, that was it. The McDonald interview was on "The Manion Forum."

Senator KENNEDY. It is you and your father.

Mr. MANION. Oh, OK.

Senator KENNEDY. Do you remember talking about the Supreme Court on that particular one?

Mr. MANION. We certainly did on occasion. Apparently this was a transcript of a television show which would have had to have been in the 1960's.

Senator KENNEDY. Do you remember talking then about the role of the Supreme Court and about what would be called the Court stripping or the reduction of jurisdiction of the Supreme Court in that interview?

Mr. MANION. My father had written a pamphlet called "Cancer in the Constitution," where he went into that in quite some detail. And we must have been discussing that. I do not remember the interview, but I know that was one of the things under article III, section 2 that he had proposed as a possibility of removing jurisdiction, as opposed to a constitutional amendment.

Senator KENNEDY. Mr. Chairman, I know the time is up, but I would like to get into the transcripts. This will take a little time so I will come back to it.

The CHAIRMAN. All right. Your time is up.

The distinguished Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman. I appreciate having this additional hearing.

I would like to enter a statement into the record.

[Statement follows:].

PREPARED STATEMENT OF SENATOR PAUL SIMON

I am pleased the Judiciary Committee is holding another day of hearings today on the nomination of Daniel Manion to be a U.S. Court of Appeals judge for the Seventh Circuit. I attended Mr. Manion's first hearing and was concerned about the quality of the nomination at that time. Further research has served to further those concerns.

As my colleagues know well, I have been talking about the quality of the Reagan nominations over the last year. I became sufficiently concerned about the subject that last month I gave a speech at the National Press Club and on the floor of the Senate. At that time, I stated that the Senate needed to be more insistent that nominees be of high quality. The American Bar Association's Standing Committee on the Federal Judiciary uses four categories to rate nominees: Exceptionally Well Qualified, Well Qualified, Qualified and Unqualified. The next to the bottom rating, "Qualified", in fact applies only to nominees with only minimally acceptable qualifications. Since I have been on the Senate Judiciary Committee, approximately 50% of the U.S. Court of Appeals nominees—controlled entirely by the Administration—have received this "Qualified" rating. About 75% of these were found "Not Qualified" by a minority of the ABA Committee. This is a very disturbing picture of this administration's nominees to the federal court that sits directly under the U.S. Supreme Court.

Today's nominees is part of that disturbing pattern of barely qualified Reagan selections. Mr. Daniel Manion received an ABA rating of majority "Qualified" and minority "Unqualified." He was reviewed by the Chicago Council of Lawyers, since it is the largest city in the Seventh Circuit, and received an "Unqualified" rating from that bar association. Mr. Manion's response to the Senate Judiciary Committee's questionnaire asking for the list of his published writings was "NONE". It is my understanding that Mr. Manion lacks experience in dealing with questions of federal law and federal constitutional issues which are part of the steady diet of a Court of Appeals judge. Further, Mr. Manion has had a practice consisting primarily of personal injury defense, commercial litigation and small claims defense work. Although he has had state trial court experience, he has participated in only 12 federal court trials. In none of these trials has he occupied the "first chair" and none of these trials have addressed questions of federal law. Mr. Manion told the Chicago Council that he has never argued a case in the Seventh Circuit.

I am puzzled and disturbed at this nomination. I enter this hearing with enormous reservations that I hope Mr. Manion can allay.

Senator SIMON. Let me just say by way of general background I am concerned with the quality of the nominees we have been receiving for the appellate court. The bar association uses four cate-

gories: exceptionally well qualified, well qualified, qualified, and unqualified.

Since I have been on this committee, 1½ years now, the next to the bottom rating, qualified, has been the rating of 50 percent of the U.S. Court of Appeals nominees; and of the 50 percent, 71 percent of these were found not qualified by a minority of the ABA committee. We are talking about a court that is second only to the Supreme Court.

Today's nominee——

The CHAIRMAN. Are you speaking about the American Bar Association Committee that acts on these?

Senator SIMON. The American Bar Association Committee, that is correct.

Today's nominee is part of that disturbing pattern of barely qualified selections. Mr. Manion received an ABA rating of majority "qualified" and a minority "unqualified." He was reviewed by the Chicago Council of Lawyers since it is the largest city in the seventh circuit and received an unqualified rating from that bar association.

Mr. Manion's response to the Senate Judiciary Committee's questionnaire asking for the list of his published writings was none. It is my understanding that Mr. Manion lacks experience in dealing with questions of Federal law and Federal constitutional issues that are the steady diet of a court of appeals judge.

Mr. Manion has had a practice consisting primarily of personal injury defense, commercial litigation, small claims and defense work. Although he has had State trial court experience, he has participated in only 12 Federal court trials. In none of these trials has he occupied the first chair, and none of these trials have addressed questions of Federal law.

Mr. Manion told the Chicago council that he has never argued a case in the seventh circuit.

I would like to enter into the record, Mr. Chairman, a letter from the Chicago Council of Lawyers by their president, Robert G. Perkins, in which they also say some positive things about Mr. Manion, but their conclusion is Mr. Manion is not qualified to be a judge on the U.S. Court of Appeals for the Seventh Circuit.

[Information follows:]

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Mindie Legislative Project
Jan Czarnik
Legislative Advocate

April 9, 1986

Senator Paul Simon
462 Dirksen Senate Building
Washington, D.C. 20510

Re: Daniel Manion

Dear Senator Simon:

The following is the Chicago Council of Lawyers' report on Daniel Manion's qualifications to be a judge on the United States Court of Appeals for the Seventh Circuit.

The Chicago Council of Lawyers believes that in order to be found qualified for appointment to the United States Court of Appeals, a candidate must have outstanding intellectual qualifications as demonstrated by performance in practice or scholarship. The most outstanding candidates should have established an exemplary record in both areas.

The Council has conducted an extensive review of Mr. Manion's personal background and legal career. We evaluated written biographical information and examples of his legal writing. The Council also received a list of references from Mr. Manion. This list included lawyers and judges who knew Mr. Manion and who had practiced with or against Mr. Manion. In addition, the Council developed its own list of Indiana lawyers. On March 24, 1986, seven members of the Council's Federal Judicial Evaluation Committee participated in a two-hour conference call with Mr. Manion during which we discussed Mr. Manion's legal background and experience, his judicial philosophy, his sponsorship of creationism legislation, and his views on issues such as the exclusionary rule, abortion, affirmative action, and the handling of criminal appeals.

Personal Qualities:

Mr. Manion has a high reputation for integrity, conscientiousness, and fairness. The reports from South Bend lawyers also indicate that Mr. Manion has excellent interpersonal skills, and that lawyers who work both with and against him like and respect him. Many of the lawyers to whom we talked also thought that despite his reputation for political conservatism, Mr. Manion would struggle to be fair in ruling on cases which present issues on which he has strong political views.

Legal Experience:

Mr. Manion was admitted to the Indiana Bar in 1973. He then

Senator Paul Simon
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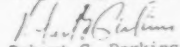
spent eight months in the Indiana Attorney General's office handling criminal appeals and land condemnation cases. Mr. Manion left the Attorney General's office in 1974, when he joined his present firm. Since 1974, he has had a general civil practice consisting primarily of personal injury defense, commercial litigation, and small claims defense work. He has tried numerous small cases in state court. Mr. Manion has participated in twelve trials to varying degrees in federal court; however, he has not yet had the responsibility for being first chair in a federal trial. He told us he has never handled a case in which a federal constitutional issue was involved. He also told us that he has never argued a case in the Seventh Circuit.

The majority of lawyers to whom we talked regarding Mr. Manion's legal experience felt that he was a competent lawyer. A few lawyers told us that Mr. Manion was an outstanding lawyer. All vouched for his forthrightness and his adherence to high ethical standards.

Despite the positive information concerning Mr. Manion's personality and basic competence as a lawyer, the Council is very concerned about the fact that Mr. Manion lacks experience in dealing with questions of federal law and federal constitutional issues. He also lacks experience with the kinds of complex federal litigation which he would have to review as a judge of the Seventh Circuit Court of Appeals. Moreover, the quality and extent of Mr. Manion's legal experience even in state court does not demonstrate the high level of legal expertise which the Council feels should be possessed by judges of the Seventh Circuit. Finally, Mr. Manion has not demonstrated any scholarly interest in state and federal law or constitutional issues.

In conclusion, the Chicago Council of Lawyers is not confident that Mr. Manion will be able to deal adequately with the difficult legal issues which are routinely presented to the Seventh Circuit. Based on the foregoing, the Council finds Mr. Manion to be not qualified to be a judge on the United States Court of Appeals for the Seventh Circuit.

Very truly yours,


 Robert G. Perkins
 President

Senator METZENBAUM. Would the Senator from Illinois be willing also at the same time to introduce a list of the professional legal affiliations of some of the board members of the Chicago Council of Lawyers indicating that they come from the most prestigious law firms in the country?

Senator SIMON. I would be pleased to do that.

Senator METZENBAUM. Thank you.

Senator SIMON. Earlier I received a letter from the chairperson for the Federal Judicial Evaluation Committee in which he said: "The Council believes that in order to be qualified for appointment to the Seventh Circuit, the candidate must have outstanding intellectual qualifications as demonstrated by performance in practice and/or by legal scholarship. The most outstanding candidate should have established an exemplary record in both areas based upon our preliminary investigation. Our Committee's tentative conclusion"—this is before they reached the final conclusion—"is that Mr. Manion falls far short of this standard."

The CHAIRMAN. Senator, may I ask you a question on that? The Chicago Council of Lawyers, is that not the liberal wing of the bar up there?

Senator SIMON. That is not correct, Mr. Chairman, and I would simply—

The CHAIRMAN. How many members are there of this organization and how many do you have in Chicago?

Senator SIMON. I cannot give you the number, but we will get it quickly.

The CHAIRMAN. You can supply that for the record. My understanding is it is about 1,000, and you probably have 10,000, do you not?

Senator SIMON. It is about the 1,000 most active lawyers in the city.

The CHAIRMAN. It is about a tenth of the bar.

Senator SIMON. It is the tenth of the bar that is most active in trial work. And I would point out, Mr. Chairman—

The CHAIRMAN. And they were complimentary here to him, if you notice.

Senator SIMON. This is the same group that found Richard Posner, one of the most conservative members of the circuit court, qualified. They also found Mr. Leinenweber, a district court nominee, a former Republican legislator and very conservative, qualified. So they have not hesitated to find conservative nominees qualified.

That same council of lawyers, the chairman of the committee, in examining a brief of yours, Mr. Manion, said—and I am quoting—

The numerous typographical errors, grammatical mistakes, and syntactical errors in the brief raise concerns about Mr. Manion's ability to write, a key qualification for a judge of the Court of Appeals. Moreover, in addition to the errors noted above, the brief lacks precision in its expression and argument. Putting aside the grammatical and syntactical errors, many of those who reviewed this brief for the Council commented that the quality of its content fell far below what one should expect from a candidate for the Seventh Circuit.

Mr. Manion, I have a letter written by you to the John Birch Society on August 27, 1979, to their American Opinion Bookstore in

Elkhart, IN. You refer to their members as the people who are on the front line of the fight for constitutional freedom.

Mr. MANION. Constitutional what? I am sorry.

Senator SIMON. Constitutional freedom. You say, and I am skipping a few sentences, "Keep up your work. Since I represent two townships in Elkhart, I would be happy to help you in whatever causes you may have before the State legislature."

Do you consider the work of the John Birch Society good work?

Mr. MANION. I do not remember that. Who was the person that I wrote to?

Senator SIMON. This was written to the American Opinion Bookstore which, as you know, is the representative for the John Birch Society. And you just say "Dear Friends."

Mr. MANION. Was this in response to a letter from them? Is this a Senate letter?

Senator SIMON. I only have a photocopy here. There is no indication of what kind of letterhead it may have been on.

Mr. MANION. I was in the senate in 1979. I am just wondering if it was a constituent letter that I was responding to, and I do not remember it. But go on. I am sorry. I did not mean to interrupt your question.

Senator SIMON. But in any event, when you say "your members are certainly the people who are on the front line of the fight for constitutional freedom," this is the very time the John Birch Society was calling Dwight Eisenhower a traitor and they were trying to impeach Earl Warren.

Mr. MANION. Wait a minute, Senator. That was in 1979.

Senator SIMON. That is correct.

Mr. MANION. Dwight Eisenhower and Earl Warren, I do not know what they were doing; you said at the very time.

Senator SIMON. Well, I am incorrect when I say that was "the very time."

Mr. MANION. OK.

Senator SIMON. But this was a group that had espoused that.

Mr. MANION. Yes, I believe that is correct. And I am asking, really, about what the letter was in response to because I wrote a lot of constituent letters, and I do not remember what that one was in response to.

Senator SIMON. It says, "Many thanks for the nice card with all the signatures on it."

Senator BIDEN. If I can help the Senator, it was in response to condolences that the John Birch Society had sent upon your father's passing, and you were responding to a—

Mr. MANION. I wrote lots and lots of letters to people who had given me condolences when my father died. That is what that was.

Senator SIMON. But when you say "your members are certainly the people who are on the front line of the fight for constitutional freedom," is that something you believed?

Mr. MANION. I think I had just been dictating a lot of letters trying to say something nice about those that said something nice about my father.

Senator SIMON. But do you believe in what the John Birch Society stands for or do you not?

Mr. MANION. Senator, I do not have any idea, other than those two things that you have mentioned, I could not tell you what the policies of the John Birch Society are.

Senator SIMON. But you have a general impression.

Mr. MANION. My father was in it, if that is what you mean.

Senator SIMON. I am not asking about your father's membership but your attitude toward the John Birch Society.

Mr. MANION. I judge any person as an individual. As far as the society itself, other than seeing literature that came along on occasion—I did not read it; I just saw it—I do not know what issues, what their stands are on the Constitution or on any other issue of current affairs.

Senator SIMON. But do you have either a positive or a negative impression of the John Birch Society?

Mr. MANION. Well, I am not a member, or I was not. I guess I have to judge each issue on its own. But as far as the society itself, I know it has been criticized. It is not something that I participated in. I am not even sure who it was that wrote that letter.

Senator SIMON. The seventh circuit, for a 12-month period, had a total of 1,940 appeals; 337 of them were criminal cases. You have had, according to the information you provided, virtually no criminal law experience.

Mr. MANION. Other than when I was in the Attorney General's office, that is correct.

Senator SIMON. In fairness, in the Attorney General's office you were involved—

Mr. MANION. I was in the criminal appellate section, that is correct.

Senator SIMON. OK. Well, then, that is not a fair criticism.

But the highest other than civil cases is civil rights cases; 25 percent of the total cases. And in the area of civil rights, your background, as I sense it, is not strong.

Is that an incorrect perception?

Mr. MANION. That is certainly not a major part of my practice. I have handled a handful of civil rights cases but not very many.

Senator SIMON. Well, in this connection, I know that—

The CHAIRMAN. Excuse me just a minute.

Senator East, are you going to vote on this?

Senator EAST. I am going to make the vote, yes.

The CHAIRMAN. Would you go ahead and vote now and get back as soon as you can? And then take over until I get back.

Senator EAST. I would be happy to.

Senator SIMON. I have a letter here indicating that you may have been promoting an article by your father called "Cancer in the Constitution." I do not know, in fairness, that you are familiar with this, but are you familiar with the article at all?

Mr. MANION. Yes. As a matter of fact, I mentioned that a little earlier when we were discussing the removal of jurisdiction under article III. That is where I remember that discussion with my father. I did not know we had talked about it on television, but I am familiar with it.

Senator SIMON. Much of the thrust of that article is basically an attack on the civil rights laws of this country.

Mr. MANION. I do not remember that.

Senator SIMON. Is that a reflection of your attitude at all?

Mr. MANION. No. I think strictly the issue that we were dealing with was on the constitutional question about removal of jurisdiction.

Senator SIMON. Let me read a sentence here.

Mr. MANION. Where is this from?

Senator SIMON. This is from this article, "Cancer in the Constitution."

Mr. MANION. OK.

Senator SIMON. "But this simple truth is about as far as one can get from the completely false but popular impression that when the Supreme Court of the United States decides, let us say, the case of *Jones v. the Election Commissioners of Illinois* in favor of Jones, its decree immediately and ipso facto reaches out to paralyze the power of all election commissioners in all States of the Union in exactly the same way. Those who know better now have an urgent obligation to tell all who will listen that the result of the decision by the *Jones* case does not affect any election commissioner or anybody else in the United States except the commissioners of Illinois who were parties to the *Jones* case.

I guess this really gets back to the question on the legislation concerns the Ten Commandments. When the Supreme Court decides something, what does that mean to you?

Mr. MANION. Well, again, we want to remember that when any judge has an issue before him it is to determine the issue of those parties. It does have an effect on a lot of other parties.

I am not familiar with the *Jones* case, but let us assume that it was similar—

Senator SIMON. I think it is a hypothetical case here.

Mr. MANION. OK. But if we are comparing the law of the case versus, we will call it, the law of the land, the law of the case is a theory that because of the issues in a particular case and because of the facts and circumstances does not apply anywhere else. Normally, however, when this happens, the court so states and says this is restrictive and applies only to those facts.

If it is more widespread, if it applies to laws, and there are similar laws throughout the country, the other laws would be affected by that Supreme Court decision, and any lower court where those other laws were challenged would be bound by the Supreme Court decision, assuming the laws were the same laws.

Senator SIMON. This same article questions whether the 14th amendment was legally ratified. It questions the validity of the 14th amendment.

Have you reflected upon that at all?

Mr. MANION. No. I am going on the assumption that it is legally ratified.

The CHAIRMAN. Senator, on that point there is a great deal of difference of opinion. When the 14th amendment was adopted, when the South seceded and the war was over, they still would not let the South vote on the 14th amendment. So there are a lot of people who feel there is a serious question as to whether it is constitutional.

Mr. MANION. I understand that, Senator, and I know the argument and have read about it. I again go on the assumption that is legally ratified and that the cases that are——

The CHAIRMAN. It has been accepted by the Court, though.

Mr. MANION. It has been, and therefore I——

The CHAIRMAN. As I understand your position, whether you agree with any decision or not, if the Supreme Court decides a case, you are going to abide by the instructions placed by the Supreme Court.

Mr. MANION. That is correct.

Senator SIMON. But as I understand your answer, you have no intention, if you are ratified, to state that the 14th amendment is not part of the Constitution?

Mr. MANION. No, I have no intention of taking that stand.

Senator SIMON. The article goes on to say that the difficulties we have gotten ourselves into go back to the 1954 Supreme Court decision on school desegregation.

Do you have any comments or do you have any unease about that 1954 decision?

Mr. MANION. Do I have any what?

Senator SIMON. Unease about that decision. Do you feel it was an improper decision by the Supreme Court?

Mr. MANION. No, no. We discussed that very early on as *Plessey v. Ferguson* was reversed by *Brown v. the Board of Education*. It was a unanimous decision, and it determined that separate but equal was no longer a viable alternative under the Constitution. I think that is the law, and I think the law has been carefully followed. I do not have any quarrel with that.

Senator SIMON. All right. I see that the signal is there and my time is up.

The CHAIRMAN. You go right ahead, Senator.

Senator SIMON. Well, I think we had better go over and vote.

The CHAIRMAN. I thought we would wait until the 5-minute bell and maybe somebody would be back by then.

Senator SIMON. All right. In the last hearing you mentioned that you thought maybe you did not receive a higher rating by the bar association because of being from a smaller law firm in a community that is not a large community. And the bar association has given me names of lawyers in towns with populations as small as 5,050 who have received very high ratings.

Mr. MANION. Those are small towns, OK.

Senator SIMON. Those are small towns.

Mr. MANION. I think I should expand on the record a little bit on that. Is that something I should do?

The CHAIRMAN. Go ahead. Go ahead.

Mr. MANION. OK. The situation is, as I said in the record here, that I became a lawyer in 1973. The American Bar Association has specifically said that while it is nice to serve in the legislature and elected office, they do not give that any value as far as a substitute for experience as an attorney. So if you would subtract out the cumulative 1 year that I served in the legislature, if you took the actual time served—even though we had a part-time legislature—it would bring me below the ABA 12-year minimum experience requirement. And I think in reflection that is why, even though a

substantial majority found me qualified, a minority may have looked at the technical issue and said I did not meet their minimum standard.

The CHAIRMAN. I would like to ask this question, and either one of you can answer it. I understand there are 14 members of this committee that make recommendations, and if any 1 member does not go along, there could be a minority report, as I understand it. Is that correct?

Senator SIMON. That is correct.

The CHAIRMAN. In other words, if 13 of them had given him a high rating and 1 objected, they would have to lower that rating in order to get agreement with that one or reach a compromise?

Senator SIMON. I would point out that while the district nominees have received acceptable ratings, the appellate nominees have not. More than one-third of the appellate court nominees have received the mixed "Qualified/Not Qualified" rating.

The CHAIRMAN. I think we had better run and vote.

Senator SIMON. Yes.

The CHAIRMAN. We will take a recess now until I get back or Senator East gets back.

[Brief recess.]

Senator METZENBAUM [presiding]. The committee will come to order.

Mr. Manion, I would like to get your thinking and your views with respect to the proposal to strip the Supreme Court of its jurisdiction.

Mr. MANION. We were discussing that a little earlier.

Senator METZENBAUM. You are in the unfortunate position of being here all the time, and we are rotating. And I do not know how far it went. I saw that Senator Kennedy got into the matter with you somewhat. Was Senator Simon the last one who was interrogating you?

Mr. MANION. Yes. If you have a question on it, I would be happy to answer it, Senator.

Senator METZENBAUM. Well, my first question is: What is your view with respect to the matter of legislation that would strip the Supreme Court of its jurisdiction to hear certain cases?

Mr. MANION. What we had discussed earlier while you were voting was that the article III, section 2 of the Constitution does discuss in certain terms, and I did read that into the record and will not do it again, giving Congress certain authority to determine jurisdiction, appellate jurisdiction. This is what I would have to call a scholarly debate about whether or not that is a prerogative for the U.S. Senate and the Congress. But it is certainly a prerogative confined to the Congress. It is not for a court or a judge to decide. Whether or not there is appellate jurisdiction.

If there is to be any kind of removal or stripping, as you put it, it would be in your bailiwick and the Congress would have to do it.

Senator METZENBAUM. Do you think the Supreme Court should be supreme?

Mr. MANION. I think it is supreme. This is appellate jurisdiction.

Senator METZENBAUM. Pardon?

Mr. MANION. Appellate jurisdiction is what is stated in the Constitution.

Senator METZENBAUM. Well, let me read from that same "Manion Forum" broadcast, which I understand was in 1971. You had indicated you thought it was in 1960.

Mr. MANION. I am sorry. I did not know when it was. Is that the television show in 1971?

Senator METZENBAUM. Yes.

Mr. MANION. That must have been right at the end, because the television show ended in the very early 1970's. But go ahead.

Senator METZENBAUM. Dan, what are the things which you have observed which make you suspicious of the supremacy of the Supreme Court?

And you then answered your dad: "Well, I ask you, why is it supreme? Because of the things it has done. It seems to have gone into regulating schools and their management. It tries to redistrict the legislature such as they are doing here in Indiana."

Your dad: "And also the congressional districts."

You: "That is true, and they took prayer out of school. That was a few years back. And now it seems that they have allowed pornography both in the newsstands and the movie theaters. That is why. Why is it supreme? Why are they allowed to do this?"

You then went on at a later point—

Mr. MANION. I am asking why?

Senator METZENBAUM. Yes, you are asking why is the Supreme Court allowed to do certain things. Yes, that is you making the inquiry.

Mr. MANION. OK.

Senator METZENBAUM. Later on you say, Dan Manion: "OK, then. Why, again, is the Supreme Court supreme if this is so clearly defined in the Constitution?"

Your dad: "The Supreme Court is not supreme. The Supreme Court has assumed the supremacy which it does not have."

"Now you mention, first of all, this matter of, what was it, State legislative redistricting?"

"Right." That is you answering. "Right."

And you go on then to say at a later point, and let me read the balance of it.

Your father says: "So here the Court has invaded an area, and when it did this, by the way, Frankfurter and Harlan, who is still on the Court, both said in the case of *Baker* that the Court was entering a judicial thicket which no previous Supreme Court had ever dared to enter. Consequently, they were deliberately out of bounds." That had to do with legislative redistricting.

You say: "That is regardless of what the State says?"

Your dad says: "Regardless of what the State says. In 13 States convicted criminals have been turned loose by this attitude of the Supreme Court to set itself up as a jury to judge what is obscene, which is a matter of fact and not a matter of constitutional law as they have attempted to make it."

You: "OK. Back again. How do we put them back in bounds?"

Your dad: "We put them in bounds by taking from the Supreme Court its right to hear appeals of convictions in the various States by juries on obscenity questions."

You: "Who has the right to remove that jurisdiction?"

You: "Congress."

Mr. MANION. Did I say Congress?

Senator METZENBAUM. Excuse me. Your dad says Congress.

Mr. MANION. OK.

Senator METZENBAUM. You are right.

"Congress."

This is still your dad: "You said there a moment ago on the Constitution that they will have the appellate jurisdiction with such exception and modifications as the Congress shall make." Then I will skip a paragraph.

And your dad says: "If a jury has decided it," and you are talking about an article that Everett Dirksen had written. "If a jury has decided, he said either in a State or Federal court, the Supreme Court not hear an appeal from that conviction." That is talking about his legislation.

Mr. MANION. That is quoting Senator Dirksen?

Senator METZENBAUM. Yes.

Mr. MANION. Apparently he had introduced some legislation to remove jurisdiction.

Senator METZENBAUM. That is correct.

You: "And this would be up to the Federal Congress to remove that jurisdiction."

Your dad: "Certainly. And Dirksen, of course, knew about the power of Congress, and he explains the power of Congress in this particular article. And you, ladies and gentlemen, should read Senator Dirksen's article in the November issue of the Reader's Digest in which he describes the bill which he left before the Senate and which is still there, taking jurisdiction of the Supreme Court in the appeals from obscenity cases. Therefore, if your man in Utah was convicted of obscenity, he would stay convicted. And if a jury in New York freed a man of obscenity in New York, he would stay free. In no case, according to the Dirksen bill, would the Supreme Court have the right to sit in judgment upon what that jury had found. And that makes sense, it seems to me."

You: "It sure does. I am glad there is a way we can curtail the Supreme Court."

Do you think we should curtail the Supreme Court?

Mr. MANION. Do you mean do I think that the U.S. Senate should curtail the Supreme Court?

Senator METZENBAUM. Well, you said "we."

Mr. MANION. "We," meaning the people, the American people. There is a way, according to article III, section 2, and that is the discussion. It is not for a judge to do; it is for you to do, if you see fit. And I do not know. I think that it has not been determined whether or not the U.S. Senate and Congress can remove jurisdiction.

Senator METZENBAUM. Well, you seem to be in the cheering section.

Mr. MANION. Remember now, my father is the boss.

Senator METZENBAUM. Yes, but I—

Mr. MANION. What we were doing, apparently, was discussing his book, "Cancer in the Constitution." In effect, I was conducting an interview in order for him to discuss it. And, yes, I think that was a very interesting possibility, still is. Apparently it is not dead yet. There are still proposals for that, for removing appellate jurisdic-

tion on certain issues. But that has to be done by Congress. It states that fairly clearly in article III, section 2. I do not think there is a case on it. Senator Dirksen seemed to think it was something that could be done.

I think most of the discussion was on judicial activism and judges, in effect, usurping the power of the legislatures and the Congress. And that was what we were really, directing our attention toward.

Senator METZENBAUM. According to this, you think that the Supreme Court should be curtailed in its right to hear appellate cases having to do with obscenity.

Mr. MANION. I do not know.

Senator METZENBAUM. Why did you say, "I am glad there is a way we can curtail the Supreme Court," if you do not know?

Mr. MANION. If the Supreme Court were to run away with something, there is the issue, the discussion issue of article III, section 2. Frankly, I do not know what issues now, 15 years later, that would be before your body to decide whether or not jurisdiction should be removed.

Senator METZENBAUM. At that time you thought that there should be jurisdiction with respect to obscenity cases——

Mr. MANION. I think that was Senator Dirksen's bill.

Senator METZENBAUM. But you supported it.

Mr. MANION. I think that I was certainly interested in it. I personally felt that a lot of obscenity rules were being overruled against the will of the people. I have a lot of personal views about a lot of issues, and obscenity is one of them. I think there are certain restrictions that have to be made. I am also very much aware that there are Supreme Court decisions based on community standards, based on certain things that have to be observed to protect the freedom of speech. And I respect that and would follow that.

Senator METZENBAUM. Well, let me just ask you this: Do you think that we ought to take away the Supreme Court's jurisdiction to hear appeals in obscenity cases, which is the position you took back in 1971?

Mr. MANION. I am not sure you can, Senator.

Senator METZENBAUM. Well, I am asking whether you think we should.

Mr. MANION. You as a Senator and the other Senators, I think you should consider it, not necessarily related to that issue, but look at it to see if it is a viable possibility in the balance of powers.

Senator METZENBAUM. Do you think we should take away the Supreme Court's right to hear appellate court cases in connection with the abortion issue?

Mr. MANION. I think that with respect to the issues that are presently before the courts appellate jurisdiction should be retained unless the Congress sees fit to remove it. As far as I am concerned, that appellate jurisdiction is intact, and I would act according to the Supreme Court decision.

Senator METZENBAUM. My time has expired.

Senator EAST [presiding]. What do you think about a brief recess?

Mr. SHORT. Here is Senator Simon.

Senator EAST. Senator Simon.

Senator SIMON. One of my colleagues earlier, Mr. Manion, read a statement from you implying that the establishment clause does not apply to the States. Is that an accurate portrayal of your views at this point? What views do you have in this area?

Mr. MANION. I think it applies to the States. I think the incorporation doctrine has personal freedoms such as the first amendment, and has incorporated those to apply to the States.

Senator SIMON. Dan, I am interested in probing your thinking also on the first amendment. A bill was passed in 1980 in the Indiana Senate to set up a textbook guideline program; some people would call it a textbook censorship program, depending on your perspective. You were among the supporters of that bill.

Mr. MANION. What bill was that? I do not remember that one, Senator. A textbook guideline bill?

Senator SIMON. Yes; I do not have the number of the bill.

Mr. MANION. Do you know what it said?

Senator SIMON. You set up a commission to approve textbooks in the State of Indiana.

Mr. MANION. I think there is a method for approval of textbooks in Indiana. I do not know whether it is by commission or by what means, but there is a textbook approval commission, as I understand it. Somebody has to approve them.

Senator SIMON. Well, regardless of the details of this particular bill, senate bill 177 was the number.

Mr. MANION. I was not a sponsor of that, or was I?

Senator SIMON. I do not have an indication that you were a sponsor, but that you voted for it, passing the Indiana Senate 28 to 21, and then was killed in the house.

The fundamental question is what are your feelings on the first amendment and freedom of speech?

Mr. MANION. Oh, I favor free speech.

Senator SIMON. I would not expect you to say that you were not in favor of free speech.

Mr. MANION. I thought that was your question.

Senator SIMON. But do you have any reflections on the threats to free speech, whether in terms of newspapers, television, textbooks or anything else?

Mr. MANION. Yes; I think that we need to protect free speech. Are you referring to it in the context of textbooks?

Senator SIMON. Well, the textbook issue is the one that brought it up.

Mr. MANION. OK. I think textbooks have to be reviewed by someone to make sure that they are written in such a way as to educate, and I think somebody needs to scrutinize them.

I am not saying that I would be the authority to do that, but I think people in the field, the people that have certain abilities should review textbooks. Somebody does it and somebody decides what textbooks are going to be used and what ones are not going to be used for a lot of reasons.

I do not know what they are, but I think a book would be reviewed to see if it teaches the course that it is supposed to teach. And I assume that we would also want to make sure that if it is a history book, it has got history in it; maybe it is the history of Indiana. I think there are lots of things that different people of differ-

ent authority would want to review to make sure it is a proper book.

There is a lot of competition, as you know, among textbook publishers, and somebody has got to decide which one of those is going to be used.

Senator SIMON. But you do not think you can leave that up to our local school boards?

Mr. MANION. I think a local school board should have a lot of autonomy. I do like that. But I think that if the legislature is providing funds, there is reason to review it the textbooks.

I wish I remembered that bill. I just do not know what it did.

Senator SIMON. It is called SB-177, textbook morality.

Mr. MANION. I would have to see the bill to know whether that addressed that or not.

Senator SIMON. It is a whole series of things that—

Mr. MANION. That you have to look out for?

Senator SIMON. Yes.

But I am interested frankly not so much in this one bill than what your feelings are on this matter.

Mr. MANION. I do not like restricting anyone's freedom of speech. But I think there is a point at which—and pornography is one of those issues that we were just discussing a little while ago—freedom of speech goes beyond, it becomes a sort of a license and abuse.

Now, I have a very difficult time determining, as does the Supreme Court and all other courts, where that line should be drawn.

When it comes to textbooks, I have had no experience in reviewing textbooks and determining whether or not they meet moral standards.

Senator SIMON. In your legal experience, have you had any suits involving freedom of speech issues?

Mr. MANION. No.

Senator SIMON. I do not have any further questions at this point, Mr. Chairman.

The CHAIRMAN. The distinguished able ranking member of this committee, Senator Biden.

Senator BIDEN. Thank you very much.

The first and most important question I have, Mr. Manion, would you like a cup of coffee or a coke or something like that, seriously?

Mr. MANION. No, thank you.

Senator BIDEN. I have taken the time to sneak out and actually eat my lunch.

But seriously if you would like anything.

Mr. MANION. No, thank you. I am in good shape.

Senator BIDEN. Let me followup on this textbook morality legislation.

The CHAIRMAN. Excuse me a minute.

Senator BIDEN. Sure, Mr. Chairman.

The CHAIRMAN. Beware of the Greeks when they come bearing gifts. [Laughter.]

Senator BIDEN. He should be more concerned about an Irishman bearing those gifts.

Mr. MANION. Just remember I am an Irishman, Senator.

Senator BIDEN. That is right. [Laughter.]

You know what they say, that old expression. My Grandfather Finney used to say, "We Irishmen are a fair people. We never speak well of one another." [Laughter.]

Mr. MANION. Well, I know what is coming then. [Laughter.]

Senator BIDEN. There is also another one. You might be able to use this, Mr. Chairman.

There is an Irish blessing, seriously it is an Irish prayer that an old Irish priest from Scranton, PA, sent down to me. And Paul has heard me say this. "May those who love us love us, and may those who don't, may God turn their heart. And if he cannot turn their heart, may he turn their ankle so we can know them by their limp." [Laughter.]

Let us go back to textbooks, if we could, please.

Do you recall voting for the legislation, 177, the textbooks?

Mr. MANION. I presume I did, or he would not have brought it up.

Senator BIDEN. This was in 19—I do not know how many—obviously it was a bill—I should not say obviously—I suspect it was a bill that received some attention in the State legislature. This was in 1980. There cannot be that many pieces of textbook legislation in the Indiana Legislature.

You mean you do not remember? You do not remember the debate or discussion about this?

Mr. MANION. If I saw the bill, I might. I do not remember it off-hand.

Senator BIDEN. OK.

Do you think there was more than one textbook vote in the Indiana State Legislature, the State senate, when you were there? Were there a whole bunch? Is this something you did a lot of times?

I mean it kind of surprises me. Because if someone said to me do I remember in 1980 voting on a piece of bussing legislation or on a controversial abortion bill, or on a prayer in school bill, I cannot imagine not remembering whether I voted on it, whether or not I saw the bill. I mean it seems somewhat disingenuous.

But, at any rate, if you say you do not remember it, you do not remember it.

Let me ask you if you can tell me what kind of things do you think people should review when they review textbooks?

Mr. MANION. Well, I am not an educator, but I would assume, first of all, that they have to make sure that a textbook is going to properly teach the applicable course.

Senator BIDEN. You do not have any problem with a—the real place these things usually come into play on airing these debates, at least in my State, are on the kinds of literature children are assigned to read.

Do you think that—you do not have any problem with students that are juniors and seniors and sophomores in high school reading "The Scarlet Letter," do you, about adultery? Do you have any problem with that?

Mr. MANION. Do I have any problem?

Senator BIDEN. Yes.

Mr. MANION. I had to read it.

Senator BIDEN. Yes, I know. But do you have any problem with it? Do you think it is right or wrong?

Mr. MANION. Well, any book, literature, whatever, I think I would prefer to keep it confined to the school board and to the family.

Senator BIDEN. So you think that a school board could and should make a judgment about, for example, whether or not they should censor "The Scarlet Letter"?

Mr. MANION. I did not think we were talking about censoring "The Scarlet Letter."

Are you talking about an assignment of a book?

Senator BIDEN. Yes, assignment of a book. You know, students say the assignment of this class is to read "The Scarlet Letter."

Mr. MANION. OK. It does not bother me.

Senator BIDEN. But do you think a school board should be in a position to say no, not to read "The Scarlet Letter," teacher, because it talks about adultery?

Mr. MANION. No, I personally do not think "The Scarlet Letter" is any problem.

Senator BIDEN. Well, you do know in some States—the reason why I raised this, this is just not something out of whole cloth. I mean this is a debate going on in America in some school districts in some States that are actually going down the shelves of the school libraries, saying books like "The Scarlet Letter" are pornography. Therefore, they cannot be read.

And you said you thought pornographic literature should not be in the schools. And I am just trying to get a sense of where your balance is.

Mr. MANION. Well, this is a very difficult thing, to determine what is pornographic. And I do not think "The Scarlet Letter" is.

As you know, there has been discussion about books that are antisemitic, books that are antiblack, books that are anti-Christian. There are lots of things people want to get out of the library. And I know those are difficult decisions. And I think somebody has to make them. Who that is, I do not know.

I am a believer that school boards are the closest to the issue and the people that can do it. Some may say the teachers. I think it is something you just cannot ignore. I think somebody has to take the responsibility.

Senator BIDEN. Well, with the school board—then why did you vote to move it to the State?

Mr. MANION. Well, I would want to look at that bill, but I assume at that time that there was testimony and there may have been a reason for it. But I do not remember any specific book that was discussed or any specific problem. And because of that vote, it obviously was a split decision. This may have been something that the school boards opposed, for example.

Senator BIDEN. I would like to go back again, without asking you to rule on cases, to go back to your "you don't remember," but when we showed you in "The Manion Forum" back in 1977, April 3, 1977, that broadcast, you said——

Mr. MANION. The interview with——

Senator BIDEN. The interview with Congressman McDonald.

Mr. MANION. OK.

Senator BIDEN. My personal observation is that this is one of the finest summaries of the history of our country. What has happened in the past, what has happened to us, and what we have to do about it.

And then you went on to say, "We hope other people in the Congress will read the book, 'We Hold These Truths,' so that they will realize that solutions to our problems are available."

Now, in that context, I am going to ask you if you remember the chapter from the book that says, and I quote, "pleading for reestablishment of constitutional government as ordained by the Constitution in 1789, is not ignorant advocacy a return to a simpler world? Rather, it is a suggestion that the Nation climb up and stand on high ground at once. The government system ordained in the Constitution is as appropriate for our Nation today as it was for America in 1789. It is even more desperately needed now than then."

Do you remember that?

Mr. MANION. I remember it because somebody else read it earlier here.

Senator BIDEN. Now, do you agree or disagree, whether you remember it or not, do you agree or disagree with that characterization?

Mr. MANION. I probably would not characterize it exactly that way.

Senator BIDEN. Does that mean you do not agree?

Mr. MANION. I think if I were going to talk about the Constitution, I would want to frame it in my own words.

Where I talked about—

Senator BIDEN. Would you do that for us?

Mr. MANION. The Constitution?

Senator BIDEN. Frame it in your own words.

Mr. MANION. Sure.

I think it is one of the greatest documents ever written. I think it is the foundation for freedom in this country and the preservation for freedom in this country.

One of the reasons that I am actually pleased to be back here is because I understand the magnitude of this job, and when I stand up and swear that I am going to uphold the Constitution, and I really believe that, and I respect that document beyond any other, I think, that was written. And when I look at the Constitution, that is the way I feel. I feel it in my heart as well as intellectually.

Senator BIDEN. Article VI of the Constitution reads, in part, "The Senators and Representatives before mentioned and the members of the several State legislatures and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution. But no religious test shall ever be required as qualification to any office or public trust under the United States."

Now, you had testified with regard to the issue—my time is up? I will come back.

Senator EAST [presiding]. Senator Simon?

Senator SIMON. I have no further questions.

Senator EAST. Senator Biden.

Senator BIDEN. Thank you.

You had testified earlier in response to the rationale as to why you voted in the Indiana State Legislature for a piece of legislation that was patently unconstitutional; that it was a protest, both.

How do you square that with the oath with the constitutional requirement that you as a State legislator had, in fact, something you acknowledge you were quite certain that was unconstitutional? How do you square that with upholding your oath?

Mr. MANION. First of all, I am going to make a sharp distinction about the legislative prerogative in a legislator's duty. And I think you and your other members experience this too. They are challenging Gramm-Rudman for example.

I do not know, but some people said it was unconstitutional at the start.

There are other issues that are before this United States Senate that are claimed to be unconstitutional.

I think, as I testified earlier, that this was probably more of a protest. And whatever dissimilarities there were, probably would have been overruled. But I think what we were stating in the vote, it was 39 to 9, a pretty strong majority, was the way the people felt.

And we look at our own Indiana Constitution in the Preamble. The Preamble says, "We, the people of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution."

We felt in the legislature that we were not enunciating any specific religion. We were just stating the principle of the foundation of our country.

Senator BIDEN. The Ten Commandments.

Mr. MANION. Yes. And I lost.

Senator BIDEN. So you read the Indiana Constitution as saying be thankful to the Almighty God means subscription to the Ten Commandments?

Mr. MANION. No; we are really not saying that you subscribe to the Ten Commandments. I think what we were trying to do there, and admittedly the Kentucky law was doing the same thing, and that was determined to be unconstitutional we were trying to put that up as a document that showed the formation of our natural rights and of, frankly, a lot of our own lives.

Senator BIDEN. The Ten Commandments that is.

Mr. MANION. Yes; there are all kinds of punishments for murder but there is nothing that says thou shalt not kill in our Constitution. There is no law that says that. This is an example.

It is a fundamental human right, and it is assumed that it is a constitutional right.

Now, as far as the natural rights, as described by the Indiana Constitution, they are life, liberty and the pursuit of happiness.

Senator BIDEN. If you were the attorney general of Indiana at the time. As I understand Indiana law, assuming that it passed both Houses, the attorney general had taken an oath to make an honest recommendation to the Governor—

Mr. MANION. He probably would have recommended against it based on that Kentucky law.

Senator BIDEN. Would you have recommended against it?

Mr. MANION. If I were attorney general?

Senator BIDEN. Yes.

Mr. MANION. Probably.

Senator BIDEN. And that is what confuses me.

You swore an oath to uphold the Constitution. You are making—I assume your argument is that you are making an analogy between a debatable Constitution issue like Gramm-Rudman and this issue.

Was there any doubt in your mind that this was unconstitutional?

Mr. MANION. Again, as a cosponsor of that bill, I had heard that a similiar bill had just been overturned in Kentucky. And the person that had sponsored it wanted to clear it for a vote anyway, and essentially it was as a protest. I do not think anyone expected it to become law.

Senator BIDEN. You are under oath. There is no doubt in your mind when you were going to vote?

Mr. MANION. Yes, I am under oath. I do not need to be reminded of that, Senator. I respect that very much.

Senator BIDEN. So you, in fact, are swearing to us that you knew at the time that you voted for this amendment that it was unconstitutional?

Mr. MANION. I knew the Kentucky law had been overruled.

Senator BIDEN. Is that a distinction with a difference?

Mr. MANION. Well, obviously Indiana—this particular law had not been. But it may have been.

Senator BIDEN. Well, that gets me back to our friend, Mr. McDonald. Because again in your characterization of his book, he talks about—let me find this—the definition of a constitutional right. Where is that section, do you recall?

Because, you know, he makes the case here, he says in his book, and I quote,

Please understand that a Supreme Court decision is not the law of the land. Indeed, it is not a law at all. Only a legislature can make laws. The Supreme Court decision is a rule that is binding only on the parties involved in the case, and it is enforceable only on that limited group if the executive and legislative branches choose to enforce it. However, when a Supreme Court decision overrules a few people in one city or of one State, other cities and other States generally try to apply the same new standard to whatever they are doing that is similar. In that sense, only the Supreme Court decision—

Excuse me—

In that sense, only can a Supreme Court decision be called the law of the land. Most people try to obey it whether it has anything to do with them or not, because they fear if they do not, in a subsequent case involving them, it will be rammed down their throats anyway.

Do you agree with that? Because it sounds like you do agree with that philosophy. Here a Kentucky case is clearly overruled, you know that, you are about to vote on a law that is, if not on all fours, awful close, you know that too, as I understand it. And you vote for it anyway.

Is it because you subscribed to the McDonald's interpretation of the thrust and force of a Supreme Court decision as I read, or was it for some other reason?

Mr. MANION. Well, as I said before, it was probably a protest.

But what you are outlining there is the distinction between the law of the case versus the law of the land or the law of the State. There are those who will argue that a Supreme Court decision is only the law of the case until it is otherwise applied.

I think, as he points out there, most of the time people will—let us just take it the other way.

Suppose we had passed it beforehand and it existed, and someone challenged it in another State and thereby, let us say, Kentucky's law came after ours, as first, as the ruling. Then what would happen to Indiana's law? It would probably have been changed.

Senator BIDEN. Because it was unconstitutional.

Mr. MANION. Well, it would have been ostensibly unconstitutional and it probably would have been repealed.

Senator BIDEN. Well, let us go back to *Brown v. The Board of Education*, *Plessey v. Ferguson* before that. I mean what we have in *Brown v. Board of Education*, there was a little old Delaware kid along with two other families that said, hey, separate but equal is not equal. *Brown v. The Board of Education* came along, the decision was made. Everyone in the country either agreed or disagreed but understood that the Supreme Court was saying, not just for that little guy in Delaware, not just that single school district in Delaware, but to the whole of the United States separate but equal is not equal.

Do you have any doubt that that is what the Supreme Court meant?

Mr. MANION. I am sure that is what it meant.

Senator BIDEN. Well, then, I do not understand your rationale that you just explained to me now.

If, in fact, the Kentucky law was stricken, it was on all fours, you were about to attempt to do the same thing you just found out was clearly ruled as unconstitutional, by the Supreme Court of the United States of America, how can you have any doubt that it would have applied to and did apply to, the State of Indiana, unless you subscribe to the McDonald notion which said "It only applies to those parties and that place where it was brought."

Mr. MANION. Well, I think we passed that law basically as a protest, stating what our opinion was in Indiana, and 39 to 9 in the Senate. And, yes, it is unlikely that it would have survived the legislative process.

Senator BIDEN. Unlikely? Is it not impossible?

Mr. MANION. You mean ultimately if it were challenged?

Senator BIDEN. Yes.

Mr. MANION. Yes, I would say it probably would have been overturned.

Senator BIDEN. And now we are back again to the Constitution which you say, and I believe you intend to subscribe to, Article VI saying that you must uphold the Constitution.

Mr. MANION. Yes.

Senator BIDEN. It is clear you understood what the Constitution meant as a Constitution. That is the Supreme Court interpretation of the Constitution which was, under your analysis, a stare decisis, the law of the land. And yet so that here we are, you have now got a provision of the Constitution that says you are bound by oath to support the Constitution. And you said that means as interpreted

by the Supreme Court and the stare decisis. And yet you vote the other way. You vote against the Constitution.

Is that correct or incorrect?

Mr. MANION. The vote is as it appears, that is correct.

Senator BIDEN. Let me proceed a little further, if I may.

Again from Mr. McDonald, again to get a sense of your understanding of the Constitution and what your oath is, and is not, and what it would or would not be as a judge. He says, and I quote, on pages 39 and 40 of this document, this book, "Notice the famous due process clause in the Fifth Amendment 'nor be deprived of life, liberty or property without due process of law.' It meant merely that we must be given the protection of the formalities customarily followed," and then he goes on to say that, "But in no case in any jurisdiction did due process mean a court looking into the fairness or constitutionality of the law in question. That was another legal matter entirely."

Now, I was confused when I first read that. But Mr. McDonald, Congressman McDonald went on to point out some examples. He says that, let me just read, bear with me a minute, he said,

In Old England, hanging a sailor at a yardarm after the Captain had thought matters over and had given the order, was due process, because the Captain possessed the authority to do so. That was the way it customarily was done. If the mate had the man hanged without giving the facts to the Captain and letting him decide, that was not due process, because the mate did not possess such authority.

In civilian affairs, due process could also be abrupt. Sending a man to jail for contempt of court without trial, or for any other formality, was due process, because the judge was the entity with authority to do it. And that was the way it was customarily done.

In civilian cases involving petty crime, customary formalities were rather brief. But in cases of felonies, due process involved a great deal of customary authority, et cetera.

And it goes on to say that

In civil matters, lawsuits between citizens and lawsuits by citizens seeking relief in a court from what they considered unconstitutional legislation, various kinds of customary formalities (due process of law) were followed depending on the nature of the case and the legal jurisdiction involved.

But in no case in any jurisdiction did due process mean a court was allowed to look into the fairness of constitution of the law in question. That was another matter. If a decision of a trial court was appealed to a higher court, the appeal court was limited to review the transcript to determine whether all due process of law had been followed by all officials of the government involved from the arresting officers to the trial judge.

In English common law, the significance of the phrase "due process of law" was purely procedural. And that is how it should be here.

Now, do you agree? First of all, do you recall that portion of the book?

Mr. MANION. Well, you read it to me, so I assume it is correct.

Senator BIDEN. Now, do you agree with that definition of due process?

Mr. MANION. Well, I think that definition is a combination of old English law, martial law, the law of the sea, and the Constitution. I think that due process is under the Constitution and the 5th amendment, 14th amendment, I think it is much better defined in the case law.

Senator BIDEN. Do you believe due process clause allows and/or requires a court to look at the constitutionality of the law in question, the one that is being challenged?

Mr. MANION. Yes.

Senator BIDEN. Good.

Now, again from the McDonald book, "By 1930, illicit Federal power could control any local business activity which Congress deemed to have an effect on interstate commerce."

Do you agree that the control of local activity through the commerce clause, interstate commerce clause, as having an effect on interstate commerce is illicit Federal power?

Mr. MANION. No. I think a lot of the cases under the commerce clause, as they restrict many enterprises and activities are properly interpreted under the commerce clause.

Senator BIDEN. With regard to how you view the 14th amendment—

Mr. MANION. I am sorry?

Senator BIDEN. With regard to how you view the 14th amendment, I have the following question to ask you:

In the McDonald book,

Two-thirds of both chambers did not vote for the resolution proposing the 14th amendment as must be done under the Constitution for legal passage of such a resolution. The radical Republican majority resolved that the resolution did pass. Three-fourths of the States did not ratify the proposed amendment as required by the Constitution. But the radical Republican majority in the Congress had the Secretary of State proclaim it ratified anyway on July 20, 1868. Therefore, the only conceivable constitutional intent of the due process clause in the 14th amendment is to permit Federal court review of any State court case when properly appealed into the Federal court for the limited and exclusive purpose determining whether the States' own due process of procedure has been followed. The 14th amendment did not stipulate, and nowhere in its legislative history can it be found to hint it was intended to stipulate that States must adopt Federal due process rules in legal proceedings.

Is that your interpretation of the history of the Constitution? Because you remember now, we are asking in the context of your saying this was one of the finest summaries in the history of our Constitution.

Mr. MANION. That statement that you read, it was in several issues. First of all, the incorporation document, which I have already testified about and how that applies. And the second thing is on the ratification of the 14th amendment which Senator Thurmond discussed earlier and commented on, if there is a controversy back there.

As I testified, I think the 14th amendment is properly ratified, and I assume it is properly ratified, and would act accordingly.

As far as the due process clause under the Constitution, the 5th amendment and the 14th amendment, I think it does require a review of cases brought up for their constitutionality and it also requires a review of any statute that is applied to make sure that each person to whom that statute is applied is allowed due process under that law.

Senator BIDEN. Quoting from the book,

In 1896, Plessey versus Ferguson, United States Supreme Court under authority of the 14th Amendment, reviewed a State law involving racial segregation of passengers on railroads. This is the first major case in which the Supreme Court decided that the 14th Amendment empowers the Federal Government to set and enforce national standards for State handling of sociological problems as distinguished from economic problems.

Further on,

Any governmental control necessary for the handling of such problems should never be imposed by any political power further away than the State line.

Do you agree with again the constitutional history, the history, as accurately portrayed and the conclusion?

Mr. MANION. The process of the Constitution—and I do not know in what context he was referring to. Would you tell me the first sentence of that?

Senator BIDEN. I am sure I can help. In *Plessey v. Ferguson*.

Mr. MANION. Right. He is talking about *Plessey v. Ferguson*, but I do not understand what he was leading to. Obviously we have discussed *Plessey v. Ferguson*.

Senator BIDEN. Where he was leading to is the Government, any governmental controls necessary for the handling of social problems should never be imposed beyond the State line.

Mr. MANION. OK. That is the incorporation doctrine, again, I think.

Senator BIDEN. But do you agree or not agree?

Mr. MANION. Well, I have already testified that I think the incorporation doctrine is ingrained in the court decisions and they must be followed.

Senator BIDEN. Do you think it is right?

Mr. MANION. Do I think it is correct?

Senator BIDEN. Correct.

Mr. MANION. Yes.

Senator BIDEN. Now, the other aspect of what he was talking about, as I understand this book, was about the question of the exercise of Federal judicial power relative to the court. He says, and I quote,

The Warren Court claimed authority under the Fourteenth Amendment to hear and decide the Brown case, but acknowledged that the amendment was not intended to affect the operation of public schools.

Do you think that is accurate?

Mr. MANION. Where are you reading from? Is this the book?

Senator BIDEN. I am sorry. From the book, yes. Page 94 of the book, "We Hold These Truths." I will read it to you again because obviously it is fair. I mean, I want to back you up. It says,

In May of 1954, the Warren court, by unanimous vote, overturned the Kansas State law under which the School Board of Topeka and elsewhere were operating racially segregated public schools, providing separate but equal facilities for each race and group in conformity with the separate but equal doctrine. The Warren court said it had concluded from looking into books and statements by sociologists and psychologists that segregating black children from white children in public schools is bad for the blacks, no matter what kind of facilities it provided and no matter what the 14th amendment or any other part of the Constitution provides. The Warren court claimed authority under the 14th amendment to hear and decide the *Brown* case, but acknowledges that the amendment was not intended to affect the operation of the public schools. All previous Supreme Court changes of the Constitution had been twistings to make it yield authority for the President and the Congress to do anything that met the Supreme Court approval. In the *Brown* case, the court arrogated unto itself authority that was superior not only to the Congress and the President, but also to the Constitution.

Do you believe that is a correct rendition of constitutional history, and do you believe it is an accurate statement?

Mr. MANION. *Brown v. the Board of Education*, by unanimous vote, did overturn a previous constitutional decision. In their analy-

sis of why they did it, all of those things, I guess he is reflecting on those and his opinion.

In my opinion, they determined that sociologically, or whatever, the Constitution as it was interpreted in 1898 was incorrectly interpreted. And I think that is what they were looking back at.

Senator BIDEN. He says,

In the *Brown* case, the court arrogated unto itself authority that was superior not only to Congress and the President, but also to the Constitution itself.

Do you think that is an accurate statement?

Mr. MANION. No. I think the court looked at the Constitution and determined that *Plessy v. Ferguson* was incorrect. I forget the person that wrote the very strong dissent in *Plessy v. Ferguson*, but I think they looked to that as well.

Senator BIDEN. Now, do you believe that the description that I read to you, McDonald's description of what happened and what the court did, is an accurate description?

Mr. MANION. No. I think that is his opinion, and it is a historic reflection in his opinion, and I think it—

Senator BIDEN. Wait. What does that mean, "historic reflection"?

Mr. MANION. It means that he had looked back at what he thought happened historically and how the *Brown* decision came about.

Senator BIDEN. But do you believe that is accurate? Do you believe his reflection on what happened is accurate or not accurate?

Mr. MANION. That is not the way that I would have interpreted it.

Senator BIDEN. Does that mean yes or no?

Mr. MANION. No.

Senator BIDEN. Thank you.

Now, if you look at this statement, what concerns me is—

Mr. MANION. Are you talking about the book again?

Senator BIDEN. No, the last statement I just read.

Mr. MANION. All right.

Senator BIDEN. OK.

Mr. MANION. I do not have that in front of me. I guess maybe that makes it a little bit difficult, but I will try to answer your question.

Senator BIDEN. I will tell you what. Here is a copy of the book.

Mr. MANION. OK. I would like to have that.

Senator BIDEN. We can read together.

Mr. MANION. Fine.

Senator BIDEN. That is fair enough. While we are sending the book down to you, can you tell me why you think McDonald's—we are on page 93, I think. Page 93, paragraph 2 on page 93, beginning "In 1986." Why do I not let you take a look at those next couple of paragraphs, and you can tell me why McDonald was wrong in his understanding of what the Constitution was and is.

[Pause.]

Mr. MANION. Are you talking about just the underlined part, or do you want me to go on?

Senator BIDEN. You can read as much as you want.

Mr. MANION. It is his opinion about how he thinks they came about it, and I guess he thinks maybe it is the wrong decision.

Senator BIDEN. Right. It is clear he does.

Now, you said he is wrong in his understanding of the constitutional history. I thought that is what you said.

First, let me start over again. You have now read it. Do you agree that he is historically and legally accurate in his characterization?

Mr. MANION. I do not remember the details of the history of that case. I presume that he recited what had happened and the facts of the case, but I do not know.

Senator BIDEN. Turn to page 94, if you would.

Mr. MANION. OK.

Senator BIDEN. Beginning "In May of 1954," the fourth paragraph down. If you would read those next couple of paragraphs, which I have already read to you but take your time and read them again.

Mr. MANION. All right.

[Pause.]

Mr. MANION. Are you talking about the statement about not affecting—

Senator BIDEN. Those whole two paragraphs.

Mr. MANION. But acknowledged that the amendment was not intended to affect the operation of public schools?

Senator BIDEN. That is part of it, yes.

Mr. MANION. OK.

[Pause.]

Mr. MANION. Well, I think what he is criticizing is basically the power of the Supreme Court.

Senator BIDEN. Is his criticism a reasonable one in the context in which you have read those paragraphs?

Mr. MANION. I think I would disagree. I think the Supreme Court does have that authority and his disagreement with it I think would be incorrect.

Senator BIDEN. And it is incorrect because why?

Mr. MANION. He says that the Supreme Court usurped certain power and displaced what was the rightful power of the States, and I think if we refer again to the incorporation doctrine and to others that the Supreme Court does have that power under the 5th and the 14th amendments to ensure due process and equal protection under the law.

Senator BIDEN. Can you figure out why you would have made the statement that you thought your personal observation was it was the finest summary of the history of our country and what has happened in the past?

Mr. MANION. Yes, I can figure that out.

Senator BIDEN. Tell me.

Mr. MANION. He was a Congressman and I was trying to be nice to him. I was interviewing him and I was having him talk about his book.

Senator SIMON. Would my colleague yield?

Senator BIDEN. Sure.

Senator SIMON. The fundamental problem, I hope you understand, is this: We have you on record as praising Larry McDonald's book, which you have every right to do. We have you on record as

promoting an article, "Cancer in the Constitution," which is an article that basically attacks the basis for civil rights laws.

Mr. MANION. No, I am sorry. The "Cancer in the Constitution" was a reflection on removal of jurisdiction and on the issue of the incorporation doctrine.

Senator SIMON. I will ask you a couple of questions about it.

Do you agree with what is in the article?

Mr. MANION. The issue of the civil rights laws may be an example of using the incorporation doctrine as displacing of State law. I think that is the reference, but the main thrust of that pamphlet was on article III, section 2, and the incorporation doctrine.

Senator SIMON. But in that article, anyway, they question whether the 14th amendment is in fact valid. We have a whole series of things, the Ten Commandments incidents, for example, where there is a question in our mind: Does the nominee really understand what the Constitution is all about?

Mr. MANION. Senator, I would love to clear up that question, and that is why I am here. I admire your research. You found certain things that I consider rather isolated; nevertheless, there they are. They are things where I have taken a stand on certain issues like the Ten Commandments issue, the creation science issue, and now an interview with Larry McDonald about a book. I think the bottom line is that I have great respect for the Constitution. I respect the law. I respect the legislature's proper role in making laws, and I respect a court's proper role in looking at those laws and their constitutionality. And all of these things, while they are interesting, I do not think distort my own personal view.

I want to be as fair as I can in trying to clear up any question you have.

Senator SIMON. If I can just follow up. The difficulty we find is these things, your letter praising the members of the John Birch Society.

Mr. MANION. Senator, please, that was in the context of them writing a letter of condolence about my father's death. And I was just trying to say something about them in thanking them for writing the letter. Really, that is the context of that letter.

Senator SIMON. But in fact you went beyond thanking them, saying that you applaud what they are doing and they are fighting for the Constitution and so forth.

Mr. MANION. No. I forget what I said, but——

Senator SIMON. But in any event——

Mr. MANION. Please take it in that context.

Senator SIMON. OK. But in any event, we do not see anything balancing; except for your testimony here today, we do not see things balancing on the other side.

Mr. MANION. Then you have not looked at all the other legislation that I was involved in. I have made a lot of statements on the senate floor. As you know, when I was in the senate, and I did send a list of legislation, I sponsored legislation setting up for those people who were getting out of prison, I sponsored a bill authorizing what was known as the Du Comb Center. I was the Senate sponsor. And that passed and it was to enable those persons that were in prison to come out to kind of a halfway house. It was a unique issue, and it was one that I got an award for—one of the

most liberal groups complimenting me for looking out for certain prisoners' rights and their civil rights and to help them get back into society.

I also sponsored a bill that same year where I was concerned about the rights of juveniles who were put into prison with other people. I sponsored the bill that would enable a contract to be let so that those people, the juveniles and other status offenders, would be protected from that kind of incarceration.

I sponsored a very important piece of legislation dealing with co-generation. I took on a lot of big utilities and a lot of other people. There was a lot of opposition, but it was a bill that I felt helped small business and people who were trying to conserve energy and to create alternative sources of energy, even though the big utilities did not like it. I did not really research to try to come up with the kind of legislation that you might prefer, but I am sure there was plenty of it. And I think if you would check with the people in the senate, the people that I worked with, both sides of the aisle and take the most liberal people, I think they will say that I was fair and I never put forth any idea of prejudice or trying to deny people rights.

Another thing that I did as far as the press is concerned, I was concerned about the protection of people who were on trial. This is another one of those balancing acts, a very difficult one, called the open courts bill. And that is who can go in and observe in a juvenile hearing or some other hearing where it is a very sensitive issue. What the judges were doing in Indiana was just closing the court arbitrarily. The press and the public did not have access. What I did, and it took me 2 years to get it through, but we passed a bill that allowed a preclosing hearing that enabled both sides to come in and say why this should be closed. The press could go in and the public could go in and have access to it. And that bill passed. It was hard to get through, but we did get it through.

And I think that those are just types of legislation, and I think the Chicago Council of Lawyers, in interviewing all the other lawyers that they talked to, even in their own letter they said that I had high integrity. I am not very good at bragging about those things, but I really think that this line of questioning in trying to show that I have some anti-civil rights tendency and that I do not respect the Constitution is really not correct. And I have high respect for it, and I want to convince you of that because I know that you personally are very fairminded. Different people who are supporting you have assured me of that, and I am here very willingly to try to convince you of that. I realize that this McDonald book, you have been going through it page by page and asking me if I agree or disagree; it is a case where my father probably asked me to do an interview because I was at some meeting where he was and so we talked about his book.

If you know the history of "The Manion Forum," it was a series of interviews where a lot of people had an opportunity to express themselves where they would not otherwise get that opportunity. It is true, a lot of them were conservative and a lot of them made those expressions. I think that my saying this is a document that is a great reflection on history and all is kind of a superficial hype,

really. I do not think that I was endorsing every line, and frankly, as they read to me, I do not endorse every line.

I just want to be as open as I can, but I want you to be fair with me, too, to understand that a lot of people would disagree with me philosophically, but would stand four square on my fairness and my willingness to listen to both sides.

Senator SIMON. Thank you.

Senator BIDEN. Do you think it is unfair of me to ask you whether you agree with provisions of the book?

Mr. MANION. No, I do not.

Senator BIDEN. If you would turn to page 113.

Mr. MANION. Was that 113?

Senator BIDEN. Yes. 113. It says—

Mr. MANION. Wait a minute.

Senator BIDEN. OK. Take your time.

[Pause.]

Mr. MANION. OK. I have got 115. I assume—

Senator BIDEN. At the bottom, the first paragraph starts off with, "As with so much of our"—

Mr. MANION. OK. It says XII, equality of voting at the top.

Senator BIDEN. That is correct.

Mr. MANION. OK. That page is not numbered.

Senator BIDEN. OK. Sorry.

The bottom of that first paragraph begins, and maybe we can read it together. It says: "Four other constitutional amendments have damaged the electoral process in subtle but dangerous ways."

And then halfway down the next paragraph, it says—

Mr. MANION. I am sorry, Senator. I missed where you were reading.

Oh, OK. You are at the first paragraph reading the last sentence. I am with you. Fine.

Senator BIDEN. Four other constitutional amendments have damaged electoral processes in subtle but dangerous ways.

Mr. MANION. OK.

Senator BIDEN. And then if you go halfway down the next paragraph, it says: "All of these are cause amendments." He just recites what the—well, we might as well read the whole paragraph, go back up to the second paragraph.

The 15th amendment, approved in 1870, prohibits State or Federal abridgment of the right to vote because of race. The 19th, adopted in 1920, extends the same prohibition to sex. The 24th, ratified in 1964, prohibits poll taxes as voter qualification in Federal elections. And the 26th amendment, approved in 1971, prohibits the abridgment the right to vote because of age of any person 18 years or older.

All of these are cause amendments, serving some political or sociological cause, which had organized pressure and public support behind them, but they all were unnecessary. If sufficiently valid to animate authentic public support, the cause could have been served as fully and as well at a State level without damaging the Federal Constitution.

Now, can you tell me in the same context that we have been talking about it whether or not you agree with the sentiment expressed in those paragraphs about the 15th, 19th, 24th and 26th amendments?

Mr. MANION. The conclusion where the States could have done it, I suppose is correct. As far as the rest of it, the States obviously

cannot amend the Federal Constitution without 34 of them agreeing. So I would disagree with that.

Senator BIDEN. Do you think that these constitutional amendments damaged the electoral process?

Mr. MANION. No.

Senator BIDEN. Give me just a second, Mr. Chairman. I want to go through. I do not want to repeat myself here.

[Pause.]

Senator BIDEN. If anybody else has any questions, go ahead.

Senator SIMON. If I may just ask one more?

The CHAIRMAN [presiding]. Senator Simon, go ahead.

Senator SIMON. Have you ever taken a case to the Federal court of appeals?

Mr. MANION. Where I have done it on my own?

Senator SIMON. Yes.

Mr. MANION. No. I have helped others in our firm, and I should add in that context that even though two lawyers especially, and a third, also, in our firm have taken cases to Federal court. All such cases have been on State issues. Even though they have practiced for 30 to 35 years and have all been on diversity cases, usually personal injury and product liability, they have never dealt with a constitutional issue.

So while we have done work before the seventh circuit, it has not been on the issues that the Chicago Council of Lawyers would have liked to have seen.

Senator SIMON. Thank you.

Senator BIDEN. Mr. Manion, as I understand the thrust of all you have said thus far, your view of the incorporation doctrine has changed somewhat; that is, 10 years ago you had more doubts about it. Is that correct?

Mr. MANION. Yes.

Senator BIDEN. And now you have no doubt about it. It is ingrained in the stare decisis of—

Mr. MANION. That is really the reason. I think this is the kind of definition of a judge taking an activist role, which has been criticized by both sides of the spectrum. But regardless of how it did evolve to where it is, it has been established. Every issue has not been decided in the incorporation doctrine, mostly it is dealing with personal freedoms. Over the years, even the right of privacy which is not enunciated, is described as a penumbra from the bill of rights. These things have been established.

Now, I am not saying that if it were 20 or 25 years ago that this would be the best way to resolve these issues. I prefer Congress doing these things, but the fact is that they have happened. It is—I will use the word again—ingrained in our case law. These are valid precedents, and I think that is where we have to leave it.

It is up to you in Congress as to whether you want to do something to change this, but I think pretty much established.

Senator BIDEN. The reason I hope is obvious why the concern because to go back to the doctrine of original intent that is enunciated by a Justice Department spokesperson, so I do not get in trouble with the chairman again, and also the characterization of how we should view the Constitution by the book that you had said—

and now you explain you were being polite—was an accurate rendition. Is there some currency—

Mr. MANION. Some what?

Senator BIDEN. Some currency for the notion, political currency for the present notion being enunciated by those who call for the doctrine of original intent, those who agree with the views put forth by deceased Congressman McDonald, that we really did not have to do anything beyond what the Constitution as written in 1787 said. And that is something that a lot of people—not a lot, but at least some people, really believe. That is important to know for us; that is why we pursued this to know whether or not you believed it.

Mr. MANION. I really appreciate the opportunity to clear that up. Because I think that in any case that recites the Constitution and is based on the Constitution or a violation thereof, you first have to look to the wording of the Constitution. But obviously you then have to look to others and precedents that have interpreted that same language. It is not that the language is different. It is just that we have certain precedents that we have to follow.

Senator BIDEN. How old are you, Mr. Manion.

Mr. MANION. Forty-four.

Senator BIDEN. We are about the same age. I am 43. And, God willing, if you are confirmed, you will be on the court for another 30 years.

In the next 30 years, a great deal is likely to change in this country if past is prolog—a great deal. The last 30 years have been a virtual revolution in this country, scientific and otherwise.

Mr. MANION. Yes, sir, that is correct.

Senator BIDEN. Now, you will be on the court for the next 30 years, God willing, if you are confirmed. And if you adopt the original intent notion of the doctrine, then in fact what you are saying to us is that you are bound by the Constitution as it is now and that there will be no growth, change or alteration in the interpretation of that Constitution.

If that had been the case 20, 30 years ago, if the court had taken that position, we would in fact be in a position very different than I would like to be in, and very much more like, I suspect, my friends from North Carolina would like to be in.

And so as we sit here and consider the judgment of whether or not we vote for or against—for example, when I listened to the speech enunciating the doctrine of original intent, the original intent was there was a poll tax. Is that what we wanted? I mean, do we think it makes sense under our system to have a poll tax?

Senator EAST. Well, of course, the Constitution was amended for the poll tax.

Senator BIDEN. Correct.

Senator EAST. I would contend, Senator, for example, on the incorporation doctrine—I would agree with the sentiment that has been expressed here. I think it has become an intricate part of the Constitution and is obviously not going to be changed.

It would not be totally frivolous to suggest that any fundamental change made in the Constitution as originally set forth should be done as a constitutional amendment. Even the incorporation of the Bill of Rights into the 14th amendment could have been done that

way. The poll tax case is not an appropriate example since the result there was achieved through an amendment to the Constitution; no one can quarrel with the amendment process.

I do not think, in defense of myself or, by implication, to Mr. Manion here—and you can treat Mr. Meese however you wish—no one is suggesting that the Constitution would not be modified and adapted and changed over time. I think what we are suggesting, at least I would suggest, is that the method which you use can be very critical. In any form of government, one should question the idea that any particular means that gets a good end is satisfactory. And in the American system where you are predicated upon the idea of representative government, democratic government, the deliberative process, I do not think it is a totally frivolous idea to suggest that it is through the legislative body that we want fundamental policy change made, not through the judiciary.

And I think at some point if there is not a conception of judicial restraint you do run the peril of significantly diminishing the representative process. But again, on the poll tax, we amended the Constitution and that would not be contrary to anything we are saying.

The CHAIRMAN. There is a vote on now. You have 7 or 8 more minutes. If you cannot finish by then, we will come back. I would like to see how the members feel.

Senator SIMON. I have no further questions.

The CHAIRMAN. Senator Simon, you have no further questions.

Senator East, do you have any further questions?

Senator EAST. No.

Senator BIDEN. I do not have any further questions. Thank you for coming.

Mr. MANION. Thank you, Senator, and I just want to say that I genuinely appreciate this opportunity because I did want to clear up any questions. I have great respect for this position, and I understand the magnitude of it.

I am pleased to be here, and I hope I have at least attempted to answer the questions that you had.

The CHAIRMAN. I might say this, that I think almost the entire afternoon borders around this one thing: That you, like other people, all of us, may have different opinions about whether a law is wise or whether it is constitutional. But after the Supreme Court interprets the law, then I believe you said you would abide by it; is that correct?

Mr. MANION. That is correct, Senator.

The CHAIRMAN. I just want to make that clear. Because a lot of people do not agree with the decisions of the Supreme Court at various times; on the other hand, a judge will abide by those laws.

Mr. MANION. That is right.

The CHAIRMAN. And people generally ought to abide by those laws until they are changed.

At the same time, because the Supreme Court has handed down one decision, it does not mean that it has got to be there forever. The *Plessey v. Ferguson* case of 1886, in 1954 the *Brown* case reversed that entirely. As times change, the courts change. So it is one of those things that anybody can appeal a case if they want to

and ask the court to review it again to see if they still feel that way about it.

But your position, as I gather it, is that you would abide by the decisions of the Supreme Court as they interpret the law and interpret the Constitution. Is that correct?

Mr. MANION. That is correct, Mr. Chairman. Yes, sir.

Senator BIDEN. Mr. Chairman, would you agree, though, if there were a nominee who would attempt to use his position on the bench in cases where there was not a clear constitutional ruling, a Supreme Court ruling, to change law back to, say, separate but equal in *Plessey v. Ferguson*—would you agree that a Senator would have a right to not want to vote for that person?

The CHAIRMAN. Well, I think if the Supreme Court has acted, that is one thing; if the Supreme Court has not acted on that particular matter, then I think it would be up to the judge to construe it as he studies the Constitution and ascertains if it agrees with the Constitution. I think he would have to use his best judgment. And a lot of the judges, of course, have been reversed and they are certainly sincere judges. They have been reversed because they interpreted the law differently from what another court might interpret. A lot of trial judges, U.S. Federal district judges hand down decisions; then the circuit courts reverse them and the Supreme Court sometimes reverses the circuit courts and go back to the decision by the trial district judge. That happened here recently; I believe either yesterday or the day before I read in the paper about a decision of that kind.

So as long as people are sincere and honest and try to do what is right and try to use their best judgment to construe the law in the Constitution, I think it is about all you can ask. Certainly if they try to follow the decisions of the Supreme Court until those decisions have been changed.

Senator BIDEN. One last thing. This is a useful discussion, at least for you and I, I hope, because it begins to outline, I think, what is one of the dilemmas we have here—not with regard to Mr. Manion—our role as advise and consent. And this does not apply to Mr. Manion. I want that clear.

If we had a nominee before us that was a member of the Communist Party but said to you, Mr. Chairman, "Although I am a member of the Communist Party, I agree to uphold the law of the land and abide by the Supreme Court decisions," would you feel bound to vote for him?

The CHAIRMAN. No, I would not feel bound to vote for him because the very principles of the Communist Party constitute a totalitarian type of government.

Senator BIDEN. Right.

The CHAIRMAN. Which is an autocracy and is altogether different from our democracy.

Senator BIDEN. If in fact there were a member of the John Birch Society—which you are not, I am told—sitting before us, would you in fact think you had a right, notwithstanding what that person said, to vote against that person because they were a member of the John Birch Society?

The CHAIRMAN. Well, I am not a member of the John Birch Society and have never been and have not studied all they stand for,

but I would inquire into any nominee coming up here the organizations he belongs to to see what they stand for.

I imagine there are some good members of the John Birch Society and some that are probably not.

Senator BIDEN. There are some good Communists, too.

The CHAIRMAN. I am not too sure that if there are any good Communists that they are sensible in understanding what they are doing.

Senator BIDEN. I do not think there are many good John Birchers that understand what they are doing.

The CHAIRMAN. I do not think you can compare the John Birch Society with the Communists. The John Birch Society people, as I have been told, are extremely conservative; they are far to the right.

Well, of course, the Communists believe in overthrowing our type of government so they can establish a Communist dictatorship, which is part of a conspiracy that wants to dominate the entire world.

Senator BIDEN. Would you vote for a Socialist, Mr. Chairman?

I am not being facetious, because we get into this thing where ideology stops. If there was a Socialist, a member of the Socialist Workers Party does not call for the overthrow of the Federal Government but does call for things like summary execution of drug dealers, for example. And that person stood there and said, "I will uphold the law," would you vote for that person?

The CHAIRMAN. I would have to consider that man's character and the man's integrity and his experience and whether I felt he would make a good judge.

Senator BIDEN. I agree.

The CHAIRMAN. If he is a Socialist, I think his theory of government, though, would still be different from our private enterprise system under our form of government, and it is very doubtful that I would vote for him on that theory, not that I would not believe what he said.

Senator BIDEN. That is the theory I am moving on.

Thank you very much. I have no more questions of the witness, but I have more of you, Mr. Chairman. We can come back.

The CHAIRMAN. Do you want to come back this afternoon?

Senator BIDEN. No, no.

The CHAIRMAN. The committee will vote on your nomination, Mr. Manion, on May 8. We will not be acting on it until then. I, personally, think you are a fine man. I knew your father; he was a wonderful man. Everything I heard about you is good, and I see no reason why the committee should hesitate to confirm you. I hope you will be confirmed, and I wish you well on the bench.

Mr. MANION. Thank you very much.

Senator BIDEN. I think you are a decent and honorable man, but I do not think I can vote for you because of your political views. But that is another question.

Thank you.

Mr. MANION. Thank you.

[Whereupon, at 5:11 p.m., the committee adjourned, subject to the call of the Chair.]

BIOGRAPHY

DANIEL A. MANION

NOMINEE, U.S. CIRCUIT JUDGE, SEVENTH CIRCUIT

Birth: February 1, 1942—South Bend, Indiana.

Legal Residence: Indiana.

Marital Status: Married—Ann Murphy Manion.

Education: 1960-1964—University of Notre Dame, A.B. degree. 1969-1973—Indiana University, School of Law, J.D. degree.

Bar: 1973—Indiana.

Military Service: 1965-1966—United States Army.

Experience: 1973—Office of the Attorney General, State of Indiana, Clerk. 1973-1974—Deputy Attorney General, State of Indiana. 1974-1978—Doran, Manion Boynton & Kamm, Associate. 1978-present—Doran, Manion, Boynton, Kamm & Esmont, Partner. 1978-1982—State Senator, Indiana State Senate.

